Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

WASHINGTON STATE GRANGE,
TERRY HUNT and JANE HODDE,

Petitioners,

vs.

WASHINGTON STATE DEMOCRATIC PARTY, et al.,
REPUBLICAN STATE COMMITTEE OF WASHINGTON,
et al., LIBERTARIAN PARTY OF WASHINGTON STATE,
et al., SAM S. REED, as SECRETARY OF STATE
of the STATE OF WASHINGTON,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Ninth Circuit erroneously views this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), as *per se* invalidating any state's partisan primary which does not restrict voters to one party and require voters to affiliate with that political party in order to vote (States' blanket, open and semi-closed primaries all would be barred)?

Whether decisions of a state's highest court upholding that state's primary election system when challenged by political parties are binding on federal courts through *res judicata* to bar subsequent challenge?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Washington State Grange states that it is a private, fraternal nonprofit corporation in Washington. None of its shares is held by a publicly traded company.

LIST OF PARTIES

The parties to the proceeding below were:

Petitioners: The Washington State Grange and two of its individual members: Terry Hunt and Jane Hodde. The Washington State Grange was sponsor of the Washington State Initiative involved in this case, and members Terry Hunt and Jane Hodde are representatives of Washington voters whose constitutional rights are affected. Petitioners were aligned as Intervenors-Appellees below.

Respondents: (1) The Democratic Party of Washington State and the following individuals who were or are officers and adherents of that Party: Paul Berendt, James Apa, Helen Carlstrom, Vivan Caver, Charlotte Coker, Edward Cote, Ted Highley, Sally Kapphahn, Karen Marchioro, David McDonald, Joseph Nilsson, David Peterson, Margarita Prentice, Karen Price, Marilyn Sayan, John Thompson, and Ya-Yue Van. These Respondents were aligned as Plaintiffs-Appellants below.

(2) The Republican State Committee of Washington and the following individuals who were or are officers and adherents of that Party: Jeff Kent, Lindsey Echelbarger, Chris Vance, Diane Tebelius, and Diane Ludlow. These respondents were aligned as Intervenors-Appellants below.

(3) The Libertarian Party of Washington and the following individuals who were or are officers and adherents of that Party: John Mills, Chris Caputo, Donald Crawford, and Erne Lewis. These Respondents were aligned as Intervenors-Appellants below.

LIST OF PARTIES – Continued

(4) Sam Reed, Secretary of State, State of Washington. This Respondent was aligned as Defendant-Appellee below. A Petition for Certiorari has also been filed by this Appellee, *Reed v. Democratic Party of Washington State*, No. 03-801.

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PETITION FOR WRIT OF CERTIORARI

Washington State Grange, Terry Hunt, and Jane Hodde respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the Court of Appeals is reported at 343 F.3d 1198. *Democratic Party of Washington State v. Reed*, (*Democratic Party of Wash.*), App. at 1.[1] The Court of Appeals' order denying the petition for rehearing and for rehearing en banc is unpublished. App. at 57. The opinion of the United States District Court for the Western District of Washington is also unpublished. App. at 19.

BASIS FOR SUPREME COURT JURISDICTION

The judgment of the Ninth Circuit was entered September 15, 2003. On October 23, 2003, the court of appeals issued an order denying a timely petition for rehearing and petition for rehearing en banc. App.

[1] Sam Reed, Secretary of the State of Washington, earlier filed a Petition for Writ of Certiorari in this same case, docket No. 03-801.

at 57. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

United States Constitution. The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const., amend. I.

Washington State Constitution.

> **Qualifications of electors**. All persons of the age of eighteen years or over who are citizens of the United States and who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, except those disqualified by Article VI, section 3 of this Constitution, *shall be entitled to vote at all elections*.

Wash. Const. art. VI, § 1, emphasis added.

> **Ballot**. All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector *absolute secrecy* in preparing and depositing his ballot.

Wash. Const. art. VI, § 6, emphasis added.

Washington Statutes

Wash. Rev. Code § 29.18.200 provides:

> Except as provided otherwise in Wash. Rev. Code chapter 29.19, all properly registered voters may vote for their choice at any primary held under this title, for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter.

Wash. Rev. Code § 29.30.095 provides:

> The name of a candidate for a partisan office for which a primary was conducted shall not be printed on the ballot for that office at the subsequent general election unless the candidate receives a number of votes equal to at least one percent of the total number cast for all candidates for that position sought and a plurality of the votes cast for the candidates of his or her party for that office at the preceding primary.

STATEMENT OF THE CASE

This case concerns a challenge to the election system used in the State of Washington for primary elections since 1935. Washington statutes contain no provision requiring or allowing voters to register as members of any political party. Indeed, the one attempt to impose a statutory "party

registration" system was rejected by Washington voters by referendum early in the Twentieth Century.[2]

Washington has historically conducted primaries using a system that permits every voter to participate in each stage of the selection of all elected officials, commonly referred to as a "blanket primary." The Washington election ballot typically has "partisan" and non-partisan offices, as well as other elections on the same unitary (and private) ballot.[3]

This case presents the question whether Washington's election system and that of any state that does not restrict voters to a single party – presumably including all "open" and some "semi-closed"[4] primaries – are *per se* unconstitutional based upon this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (*California Demo. Party*).[5] The Ninth Circuit has already invalidated Washington's and part of one other state's (Arizona) semi-closed primary.

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[2] Referendum 14 (1922).

[3] The only possible historical exception referred to by the Circuit Court was the Presidential preference ballot. This would have allowed Washington voters to choose either one party's ballot or a ballot with all parties' candidates. This 2004 Presidential primary was repealed by the Washington Legislature, H.B. 2297, Chapter 1, Wash. Laws of 2003, 58th Legis., 2003 3rd Spec. Sess. App. at 60.

[4] Also invalidated by the Ninth Circuit; *see* further discussion of *Arizona Libertarian Party, Inc. v. Bayless*, *infra*, pp. 18-20.

[5] *Compare* majority decision, 530 U.S. at 577, n. 8: "In this sense, the blanket primary also may be constitutionally distinct from the open primary. . . . (citing) This case does not require us to determine the constitutionality of open primaries." *with* the Dissent, 530 U.S. at 398: "This Court's willingness to invalidate the primary schemes of 3 States and cast serious constitutional doubt on the schemes of 29 others . . . "

Washington's blanket primary statute had been challenged twice previously, by both major political parties (Republicans and Democrats)[6] in cases which were ultimately decided by the Washington State Supreme Court, the highest court of that state.[7] This case also presents the question whether such final adjudication in a state's highest court upholding a *state* election system may ever be considered final and binding on federal courts through principles of *res judicata*.

A. Washington State Historical Background.

Washington's Constitution protects its voters through two separate constitutional provisions significantly different from provisions of many States. Qualified Washington voters "shall be entitled to vote *at all elections*" and voters are guaranteed "*absolute* secrecy . . . " of their ballots. Wash. Const. art. VI, §§ 1, 6, emphasis added.

Washington has *never* required voters to register by political party. Early in the last Century, the Washington Legislature passed such a law, but it never became effective because a referendum petition was quickly filed, and voters overwhelmingly *rejected* party registration at the next election. Referendum Measure 14 (1922).

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[6] The Libertarians were "major" parties below because one candidate polled over five percent in the preceding election (Wash. Rev. Code § 29.01.090) but historically Washington has had only two major parties.

[7] *See Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936) and *Heavey v. Chapman*, 93 Wash. 2d 700, 611 P.2d 1256 (1980).

On one occasion, the Washington Legislature also passed a statute for "party primaries." A referendum petition by voters was quickly filed. At the election, the "party primary" was rejected by more than 2.5:1, Referendum 15 (1922).

In 1934, Petitioner Washington State Grange gathered voter signatures and qualified the "blanket primary" initiative (Initiative No. 2, 1935 Wash. Laws ch. 26, now Wash. Rev. Code 29.18.200). The Washington Legislature[8] voted to enact this initiative and its then – unique blanket primary statutory system which expressly provides Washington's voters a right to "vote for their choice . . . for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter." Initiative No. 2, *supra*.

One avowed purpose of the Initiative was protecting against corruption or control over the nominating process by political bosses or special interests. For Washington, the system has worked well.

The blanket primary has proven extremely popular with voters and effective, as it has allowed Washington to establish an enviable record of among the *highest* voter turnout in the States by statutorily assuring all Washington voters the same full participation in partisan elections they enjoy in non-partisan elections. It is easily administered, since in Washington each voter gets the same single election ballot, which includes partisan and non-partisan

[8] Washington's Constitution allows its Legislature to *adopt* an Initiative or allow it to appear on the election ballot. Wash. Const. art. II, § 1.

candidates[9] and other voter issues (initiatives, referenda, tax levies, etc.).

B. Proceedings Below

Washington's blanket primary was twice challenged in the state courts by the two historic "major" parties (*see* n. 7) and twice upheld by the state's highest court. In *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936), the state supreme court rejected a challenge brought on a variety of grounds by the Democratic and Republican political parties. In *Heavey v. Chapman*, 93 Wash. 2d 700, 611 P.2d 1256 (1980), the Democratic Party and two of its officers again challenged the blanket primary, specifically asserting that the primary infringed the political party's freedom of association under the U.S. Constitution. Again, Washington's highest court upheld the blanket primary, which has now been in use in Washington for nearly seventy years. In so doing, that court specifically rejected the claims here.

In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), this Court upheld the same statute (Wash. Rev. Code 29.30.095) in Washington's primary election law, as it pertains to candidates of minor parties (or independents). This Court noted in that ruling that Washington conducted a "blanket" primary. *Munro*, 479 U.S. at 192. Indeed, that case recognized that the blanket primary of Washington served to protect the rights of voters to vote

[9] Several state-wide and many local races are non-partisan.

for independent candidates or those of minor parties[10] and thus made it easier for minor or independents to achieve one percent of the vote.

Shortly after this Court issued its opinion in *California Demo. Party*, the Washington State Democratic Party filed this action in the United States District Court for the Western District of Washington against the Washington State Secretary of State, and election officials, asserting that Washington's blanket primary and Wash. Rev. Code § 29.30.095 was invalid. The state's other two major parties,[11] the Republican and Libertarian parties, intervened as additional plaintiffs.

The Washington State Grange and two qualified Washington voters who are also Grange members intervened as additional defendants. The Grange voter-intervenors asserted voting rights protected under the Washington Constitution: a right to vote "at all elections" (Wash. Const. art. VI, § 1) and a right to "absolute secrecy" of that vote (Wash. Const. art. VI, § 6). Restricting voters to only some candidates *or* requiring public party identification as a pre-qualification to vote violates these voters' rights (as well as violating rights specified in statute, Wash. Rev. Code § 29.18.200, *infra*, p. 2). Alternatively the Grange moved to dismiss the action based on *res judicata*

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[10] The Libertarian Party supported the *Munro* challenge – as it was then a "minor" party under Washington law, Wash. Rev. Code § 29.01.100.

[11] Under Washington law, any party with a statewide candidate achieving over five percent of the votes becomes "major" for the next election. The status may revert to "minor." Historically Washington has had two "major" parties for nearly all elections.

principles and the two prior adjudications in the Washington State Supreme Court.

The political parties' complaints sought both declaratory and injunctive relief. During preliminary proceedings, the State and political parties had agreed to a preliminary injunction allowing only that year's (2000) election to proceed with Washington's blanket primary system.

Pretrial proceedings continued, with the Grange successfully moving to dissolve the preliminary injunction, allowing further state elections to be held in 2002 still using the blanket primary system.

The court then proceeded to consider cross-motions for summary judgment. The district court entered an order granting summary judgment to the State and Grange defendants, on the alternative grounds that (1) Washington's election system is constitutionally distinguishable from California's and justified by compelling interests of the state, and (2) the plaintiff political parties had failed to meet their evidentiary burden of showing harm as the result of the conduct of Washington's blanket primary.[12] App. at 19.

C. The Ninth Circuit Appeal

The political parties appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit. A three-judge panel reversed the district court.

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[12] The most recent Washington Supreme Court had expressly made the same conclusion: that political parties had *not* proven *any* burden. *Heavey v. Chapman*, 93 Wash. 2d 700, 611 P.2d 1256 (1980), App. at 81.

The Panel concluded that this Court's *California Demo. Party* invalidated any primary system which does not restrict voters to candidates from a single party and allow parties to decide who may vote. The Circuit rejected the holding of the district court below that Washington's election system was distinguishable from California's. *Democratic Party of Wash.*, App. at 11. "This case presents a facial constitutional challenge and the Washington blanket primary statute is on its face an unconstitutional burden. . . . " App. at 18.

Having concluded that blanket primaries were invalid *per se*, the Ninth Circuit did not reach the evidentiary arguments presented by the political parties' failure to prove harm below. *Democratic Party of Wash.*, App. at 18. The decision remanded the case to the district court for entry of injunctive relief. *Democratic Party of Wash.*, App. at 18.

The Ninth Circuit also expressly rejected applying the decisions of Washington's highest court through *res judicata*: "[C]onstitutional law has changed materially since then, most notably . . . when *Demo. Party v. Jones* came down in 2002." *Democratic Party of Wash.*, App. at 8.

The state defendants and the Grange both moved for rehearing and for rehearing en banc. These motions were denied by the Ninth Circuit October 23, 2003. App. at 57.

ARGUMENT: REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit decision conflicts with the decisions of Washington's State Supreme Court and threatens a prior decision in this Supreme Court. The Washington Supreme Court cases upholding Washington's primary election system in face of the same constitutional challenge by the major political parties are binding on the federal courts through *res judicata* or at least present a substantial conflict between state and federal courts.

2. The Ninth Circuit did not faithfully follow this Court in holding blanket and open primaries *per se* unconstitutional, and there is now a conflict within that Circuit. The same Circuit Court has recently also held Arizona's "semi-closed" primary only partially unconstitutional. This case found a *per se* violation, while the *Arizona Libertarian Party, Inc. v. Bayless* decision, No. 02-16535, slip. op. 17183 (9th Cir. Dec. 8, 2003), App. at 72, requires proof and balancing of interests. The U.S. Supreme Court decision in *California Demo. Party* considered the balance of harm to political parties against the compelling interests of the state which should allow States to justify their chosen election system through showing state compelling interests.

3. What form of state primaries are invalid under the U.S. Constitution is an important federal question, applicable to the majority of States with blanket, open or semi-closed primaries. The States, political parties and voters need guidance of this Court on this fundamental issue. The Panel failed to consider the record of compelling interests advanced by Washington's primary – notably protection of its voters' special *state* constitutional rights and the higher turnout and other public interests such as

preserving the role of minor parties and independents. States have a United States constitutional right to define their own voters' rights and elections systems.

The result is a panel decision likely invalidating many States' primaries. The fate of Washington's primary likely awaits the primaries of at least 21 other "open" primary States if challenged in federal court (at least in the Ninth Circuit). *California Demo. Party*, *cf.* dissent, 530 U.S. at 598.

The direct effect is dramatically reducing Washington's election turnout and likely blocking independent candidates and those of minor parties from Washington's general election ballots.[13]

This may invalidate election systems which each state is empowered to select in order to protect its citizens' right to vote. This power reflects both the express U.S. constitutional recognition of the States' power to control "time, place, manner" of elections *and* that elections systems are rules for the elections which determine the governance of each state's people, a core state power. (*See* U.S. Constitution Amendment X, powers not delegated to the United States "reserved to the States respectively or to the people.")

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[13] The Washington statute requiring candidates to receive one percent of the primary vote to appear on the general election ballot was upheld in *Munro v. Socialist Workers*, 479 U.S. 189 (1986). With voters restricted to party ballots, no independents or no minor party candidates would likely achieve one percent. Ironically, Respondent Libertarian Party will be the first victim.

A. The Ninth Circuit Decision Conflicts With The Decisions Of Washington's State Supreme Court and Threatens a Prior Decision In This Supreme Court.

Washington's blanket primary has been challenged by both major political parties (members and officials) and twice upheld by the Washington Supreme Court. *Anderson v. Millikin,* 186 Wash. 602, 59 P.2d 295 (1936), App. at 65-71; *Heavey v. Chapman*, 93 Wash. 2d 700, 611 P.2d 1256 (1980), App. at 81-88. Washington's unique constitutional and statutory protections of voters' rights[14] – state "compelling interests" – are important to the analysis of those highest state court decisions but disregarded by the Ninth Circuit.

The 1980 case was resolved in part because of the failure of the plaintiffs to demonstrate *any* harm to the political parties. Remember, there is *no* party registration in Washington and never has been. The case was a challenge clearly based on constitutional claims; specifically, the alleged effect of the blanket primary on political parties and their constitutional rights, as argued herein.

The Washington Supreme Court rejected each of the challenges, specifically upholding the compelling interests of the state:

> Finally, even though plaintiffs' case fails since they have shown no substantial burden to their associational rights, it is important to indicate certain compelling state interests which support

[14] One important interest of Washington is the participation of independents and minor parties in the political processes of that state; an interest ignored by the Ninth Circuit.

> a blanket primary. Among these are: allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary.

Heavey v. Chapman, 93 Wash. 2d at 705. App. at 86.

In reliance on its own highest court, three generations of Washington voters have used the blanket primary as a part of the process for choosing their elected officers, and independent and minor parties have grown to play an important role in that system.

The case in this Court cited by the Panel to justify not applying *res judicata* (slip op. 13654, footnote 12, App. at 8-9), *Montana v. United States*, 440 U.S. 147 (1979), actually held to the contrary, holding that the prior (Montana) State Supreme Court decision *was* binding on the federal courts through *res judicata*/collateral estoppel.

The Washington Supreme Court has also ruled on that very issue, holding that *res judicata* does apply to bar political parties and their representatives from later challenges to state elections law:

> The element frequently in conflict in *res judicata* issues is whether the identify of parties is the same for *res judicata* purposes . . . .
>
> . . .
>
> . . . The parties in the prior judgment were the acknowledged heads of the major political parties in Washington state and several state officials . . . Plaintiffs in the present action identify themselves as registered voters in one of the four districts at issue and as members of a "political

> party or group" . . . We hold plaintiffs had their interests represented in the prior judgment. . . .

Snyder v. Munro, 106 Wash. 2d 380, 721 P.2d 962 (1986).

There is an additional special reason that *res judicata* must apply here. Elections must have fixed rules understood by the citizens which are not subject to repeated challenges by any "new" political party chair or party committee.

This Court's *res judicata* rule is the same as that expressed by the Washington Supreme Court: "Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. . . . [citing cases]." *Montana v. United States*, 440 U.S. 147, 153 (1979).

The major political parties are the same and in privy with political officers who brought the prior challenges to the same statute and election system. This suit challenged the same blanket primary statute as violating *political party* rights – an issue twice adjudicated and lost by the Republicans and by the Democrats before the Washington Supreme Court (the highest court of that state). Those decisions should be binding on federal courts. There must be finality for elections systems in order that citizen confidence be assured.

The Washington election history sharply contrasts with that of California, which adopted the blanket primary ballot only in 1996 and engrafted it on California's pre-existing historical "party registration" and party primary election system.

Note, too, that a challenge to the same operative statutes, Wash. Rev. Code § 29.30.095, was before this

Court as recently as 1986 in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). The issue before this Court was whether Washington's system provided minor parties and independents reasonable access where that statute provided that one percent of the primary vote was required to continue to the general election ballot.

Reversing the Ninth Circuit Court of Appeals, this Court upheld Washington law in that regard, recognizing that in Washington's *blanket primary* system, this ballot access requirement was reasonable. In other words, the blanket primary enhances and protects rights of minors and independents – while protecting rights of Washingtonians to vote for minor and independent candidates as easily as for "major" candidates. In such a system, the requirement that candidates get one percent of the primary vote to appear in the general election is reasonable. This Court's decision upholding Washington's statute reinforced the state's confidence that its election system met constitutional standards.

Given the one percent requirement which this Court upheld in the *Munro* case, the Ninth Circuit decision here rings the death knell of minor parties and independents in Washington. If voters are restricted to one party ballot, as the decision below would require, the one percent is unlikely to be achieved.

This Court invalidated California's use of a blanket primary in *California Demo. Party* because of California's election system, which had always included political party registration of voters. Thus, the California initiative allowed voters already registered as members in one party to vote for those of an opposing party.

Party registration of voters has *never been allowed* in Washington[15] and is likely unconstitutional under that state's constitution. Washington's primary was not before the Court in the California case. This Court's decision was based on the specific issues raised by California law. *See* discussion *California Demo. Party*, 530 U.S. at 584. In contrast, the Ninth Circuit decision declares a *per se* rule which would invalidate all blanket and all open primaries because voters are allowed to choose candidates of a party with which they have not registered or affiliated.

Thus, the decision below will invalidate over 21 States' open primaries – avowedly not the intent of this Court, which noted:

> [T]he blanket primary also may be constitutionally distinct from the open primary . . . [citing] This case does not require us to determine the constitutionality of open primaries.

California Demo Party, 530 U.S. at 577, n. 8. It will be noted further below the same Ninth Circuit has already gone further and ruled part of Arizona's "quasi-closed" state primary invalid based upon its reading of this Court's *California Demo. Party* and the instant case.

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[15] Washington voters rejected party registration by referenda years before.

B. The Ninth Circuit Did Not Faithfully Follow This Court, and There Is Now a Conflict Within that Circuit. The Same Circuit Court Has Recently Also Held Arizona's "Semi-Closed" Primary Only Partially Unconstitutional.

The Ninth Circuit is already in conflict over whether this Court's decision in *California Demo. Party* automatically invalidates all States' primaries which allow non-member or unaffiliated voters to participate, or whether impacts on political parties must be proven and States' compelling interests may validate their elections systems.

The instant case conflicts in both regards with the Ninth Circuit's recent invalidation of (part of) Arizona's closed primary. *Arizona Libertarian Party, Inc. v. Bayless*, No. 02-16535, slip op. 17183 (9th Cir. Dec. 8, 2003), App. at 72-80. In the conflicting case, the Ninth Circuit in *Arizona Libertarian Party* specifically applied a "balancing test" (at 17189-90), upheld a district court decision insofar as that decision invalidates *parts* of the primary but reversed as to other parts and remanded.

First, the *Arizona Libertarian Party v. Bayless* decision is contrary to the Ninth Circuit decision here, which held such primaries constitute a *per se* constitutional violation: "[E]ven without the evidence, appellants are entitled to prevail." *Democratic Party of Wash. State,* App. at 18.

The Arizona "semi-closed" primary system is part of that state's constitution. *See* Ariz. Const. art. VII, § 10. The district court held the Arizona primary – and that state's constitutional provision – unconstitutional in its entirety. *See Arizona Libertarian Party, Inc. v. Bd. of Supervisors of Pima County*, 216 F. Supp. 2d 1007 (D. Ariz. 2002).

The Ninth Circuit complicates matters for administrators of elections by affirming the district court ruling invalidating part of Arizona's primary with respect to one of the political parties, but not, necessarily with respect to other political parties.

This latest decision of the Ninth Circuit, like the instant case, purports to be guided by *California Demo. Party* from this Court:

> Our decision on the merits is guided by two Supreme Court decisions . . . [as] relates to the selection of party candidates. *See California Democratic Party v. Jones*, 530 U.S. 567 (2000); *see also Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003).

Arizona Libertarian Party, Inc. v. Bayless, No. 02-16535, slip. op. 17183 at 17189 (9th Cir. Dec. 8, 2003).

The Ninth Circuit then remanded for further determination which will presumably occur during Arizona's election season. The Circuit Court's conclusion bears quotation in length, to illustrate the conflict with the instant case – and the extreme difficulty States and their elections' administrators will face given the Ninth Circuit's conflicting interpretations of this Court's *California Demo. Party*:

> We AFFIRM the district court's grant of summary judgment as it pertains to the election of Libertarian party precinct committeemen. We VACATE the district court's grant of summary judgment to the extent that it applies to parties other than the Libertarian Party, and as it pertains to the selection of Libertarian Party candidates. We REMAND so that the district court may consider separately the constitutionality of

> requiring the Libertarian Party to allow non-members to select party candidates and if necessary the severability of the provision relating to the election of Libertarian Party precinct committeemen. Our holding is limited to the Arizona primary system as applied to the Libertarian Party, and does not apply to any other political parties.

Arizona Libertarian Party, Inc. v. Bayless, *supra* at 17183.

C. What Form of State Primaries Are Invalid Under the U.S. Constitution Is an Important Federal Question, Applicable to the Majority of States With Blanket, Open or Semi-Closed Primaries. The States, Political Parties and Voters Need Guidance of this Court on This Fundamental Issue.

This important question must be answered as illustrated by the fact that the above Ninth Circuit cases will (both) lead to continued litigation and uncertainty as to election systems adopted by the States in that Circuit. This uncertainty exists just when the States are entering the 2004 election cycle – with several States' primaries as early as March. (Washington's is not until September). The importance of certainty and confidence in the rules for the election process is indicated by the controversy leading to (and following) the 2000 election and changes in voting systems undertaken as a result, *e.g.*, many States will try entirely new voting machines in 2004.

The Presidential election is run concurrently with all States' elections for United States Congress. Washington and most States (two-thirds) will also have elections of U.S. Senators. Further complicating administrative problems for elections officials, Washington and many

States will also run state-wide elections, including Legislative races, at the same time. It is an understatement to observe that the resultant conflict and uncertainty caused by the decision(s) below will pose a real threat to administration of the 2004 elections.

The point is further exacerbated in Washington, whose general election is within six weeks of the primary (the latest primary in the Nation – September) (Wash. Rev. Code § 29.13.070). It may become impossible to have the State's primary results certified and candidates printed on ballots to be distributed to absentees[16] in time for the November election, only six weeks later.[17]

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).[18]

This case involves the fundamental issue of voting rights protected by two sections of the Washington Constitution: (1) the rights of individual voters to participate in every stage of the election process to choose their officers

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[16] Who are now a *majority* of Washington voters.

[17] This is without considering further complications because of problems in preparing, printing and distributing Washington's constitutional and statutory voters guide. (*See* Wash. Const. art. II, § 1d and Wash. Rev. Code § 28.81.210.)

[18] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

and representatives (to vote "at all elections" in the Washington Constitution), and (2) the rights of voters to participate in the election process with their affiliation, or party, choice private ("*absolute* secrecy" in Washington constitutional terms). Are these state constitutional rights not compelling interests of that state?

The constitutional authority of sovereign States, acting through their legislative bodies, to determine how to order the election process is more broadly implicated. The United States Constitution provides (regarding United States Senators and Representatives):

> Election of senators and representatives. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; . . .

U.S. Const. art. I, § 4.

Washington has devised an election system that maximizes the electoral franchise of each voter and grants state voters full participation at each stage of the process. Not just voters but rights of independents and minor parties are protected by this system.

The major political parties assert that furthering the interests of voters results in unconstitutional impairment of the rights of major *political parties*. We assert they are not inconsistent – and that the rights of individuals and voters are directly constitutionally protected. Rights of associations such as these major political parties are derivative from the rights of individuals. Indeed, as this

Court has recognized, political parties were formed after the applicable U.S. constitutional provisions were adopted.[19] Protecting the rights of individuals were foremost in the founders' minds – *not* enhancing powers of political parties (which many founders of our Country disdained).

Even without the conflict between federal and state courts, cases involving voting and elections have long been one of the areas of the law in which this Court tries to clarify fundamental issues which are the heart of democracy. There are many examples of cases in which this Court granted review in cases involving elections without conflict in courts, *e.g.*, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) and *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996). In *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), this Court granted review because it recognized "the importance of the issues," 514 U.S. at 786.

The case presents elections issues important to most, if not all, States. Although Washington has its own form of special state constitution and primary, many others are affected. *E.g.*, *see California Dem. Party*: "3 States have blanket primaries, while an additional 21 States have open primaries and 8 States have semi-closed primaries in which independents may participate. 169 F.3d at 650." *California Demo. Party*, 530 U.S. at 598.

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[19] "The formation of national political parties was almost concurrent with the formation of the Republic itself." *California Demo. Party*, 530 U.S. at 574.

The Court should not wait for further conflicts to develop on the proper interpretation of this Court's *California Demo. Party* decision because elections – and especially the 2004 elections – may be at risk.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 16, 2004

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United States Court of Appeals,
Ninth Circuit.

DEMOCRATIC PARTY OF WASHINGTON STATE; Paul Berendt; James Apa; Helen Carlstrom; Vivian Caver; Charlotte Coker; Edward Cote; Ted Highley; Sally Kapphahn; Karen Marchioro; David Mcdonald, Joseph Nilsson; David Peterson; Margarita Prentice; Karen Price; Marilyn Sayan; John Thompson; Ya-Yue Van,

Plaintiffs-Appellants,

Washington State Grange; Terry Hunt; Jane Hodde,

Intervenors-Appellees,

and

Republican State Committee of Washington, Jeff Kent; Lindsey Echelbarger; Libertarian Party of Washington; Washington State Grange; Terry Hunt; Jane Hodde; Christopher Vance; Dione Ludlow; John Mills; Freedom Socialist Party; Green Party of Washington; Chris Caputo; Donald Crawford; Erne Lewis,

Intervenor,

v.

Sam REED, Secretary of State of the State of Washington,

Defendant-Appellee.

Democratic Party of Washington State; Paul Berendt; James Apa; Helen Carlstrom; Vivian Caver; Charlotte Coker; Edward Cote; Ted Highley; Sally Kapphahn; Karen Marchioro; David Mcdonald, Joseph Nilsson; David Peterson; Margarita Prentice; Karen Price; Marilyn Sayan; John Thompson; Ya-Yue Van,

Plaintiffs,

Jeff Kent, Libertarian Party of Washington; Washington State Grange; Terry Hunt; Jane Hodde; Dione Ludlow; John Mills; Freedom Socialist Party; Green Party of Washington; Chris Caputo; Donald Crawford; Erne Lewis,

Intervenor,

and

Republican State Committee of Washington, Jeff Kent; Lindsey Echelbarger; Libertarian Party of Washington; Washington State Grange; Terry Hunt; Jane Hodde; Christopher Vance; Dione Ludlow; John Mills; Freedom Socialist Party; Green Party of Washington; Chris Caputo; Donald Crawford; Erne Lewis; Christopher Vance; Lindsey Echelbarger; Diane Tebelius,

Intervenors-Appellants,

Washington State Grange; Terry Hunt; Jane Hodde,

Intervenors-Appellees,

v.

Sam Reed, Secretary of State of the State of Washington,

Defendant-Appellee.

Democratic Party of Washington State; Paul Berendt; James Apa; Helen Carlstrom; Vivian Caver; Charlotte Coker; Edward Cote; Ted Highley; Sally Kapphahn; Karen Marchioro; David Mcdonald, Joseph Nilsson; David Peterson; Margarita Prentice; Karen Price; Marilyn Sayan; John Thompson; Ya-Yue Van,

Plaintiffs,

Christopher Vance; Republican State Committee of Washington, Jeff Kent; Lindsey Echelbarger; Dione Ludlow; Freedom Socialist Party; Green Party of Washington; Diane Tebelius,

Intervenors,

and

Libertarian Party of Washington State; John Mills; Chris Caputo; Donald Crawford; Erne Lewis,

Intervenors-Appellants,

Washington State Grange; Terry Hunt; Jane Hodde,

Intervenors-Appellees,

v.

Sam Reed, Secretary of State of the State of Washington,

Defendant-Appellee.

Nos. 02-35422, 02-35424, 02-35428.

Argued and Submitted Feb. 6, 2003.
Filed Sept. 15, 2003.

Political parties brought action challenging Washington's "blanket primary" system, in which voters chose candidates without being restricted to candidates of any particular party, as unconstitutional. On cross-motions for summary judgment, the United States District Court for the Western District of Washington, Franklin D. Burgess, J., granted state's motion, and political parties appealed. The Court of Appeals, Kleinfeld, Circuit Judge, held that Washington's blanket primary system violated political parties' First Amendment right of free association.

Reversed and remanded.

David T. McDonald (argued and briefed), James A. Goeke (briefed), Jonathan H. Harrison (briefed), Preston, Gates & Ellis, LLP, Seattle, WA, for appellants Democratic Party of Washington State, et al.

John J. White Jr., (argued and briefed) and Kevin B. Hansen (briefed), Livengood, Fitzgerald & Alskog, PLLC, Kirkland, WA, for appellants Republican State Committee of Washington, et al.

Richard Shepard, Shepard Law Office, Tacoma, WA, for appellants Libertarian Party of Washington State, et al.

James K. Pharris (argued and briefed), Senior Assistant Attorney General, Olympia, WA, and Jeffrey T. Even (briefed), Assistant Attorney General, Olympia, WA, for appellee Sam Reed.

James M. Johnson, Olympia, WA, for appellees Washington State Grange, et al.

Appeal from the United States District Court for the Western District of Washington; Franklin D. Burgess, District Judge, Presiding. D.C. No. CV-00-05419-FDB.

Before KLEINFELD, and McKEOWN, Circuit Judges, and BREYER,* District Judge.

KLEINFELD Circuit Judge.

The State of Washington conducts a "blanket" primary, in which voters choose candidates without being

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* The Honorable Charles R. Breyer, District Judge for the Northern District of California, sitting by designation.

restricted to candidates of any particular party. The Democratic, Republican and Libertarian Parties all challenged the law, claiming that it unconstitutionally restrains their supporters' freedom of association. They are correct.

We recognize that Washington voters are long accustomed to a blanket primary and acknowledge that this form of primary has gained a certain popularity among many of the voters. Nonetheless, these reasons cannot withstand the constitutional challenge presented here. The legal landscape has changed, and our decision is compelled by the Supreme Court's landmark decision in *California Democratic Party v. Jones*.[1]

I. BACKGROUND

Washington's "blanket primary" system was first established in 1935. Except for presidential primaries, "all properly registered voters may vote for their choice at any primary . . . , for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter."[2] All the candidates from all parties are listed on the ballot, along with a party designation or "independent" designation.[3] To get onto the general election ballot, a candidate has to get a plurality of the votes cast for candidates of his or her

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[1] 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000).

[2] Wash. Rev. Code § 29.18.200.

[3] Wash. Rev. Code § 29.30.020(3).

party, and at least one percent of the total votes cast at the primary for all candidates for that office.[4]

Thus the voter gets a ballot listing all candidates of all parties and votes freely among them, as opposed to getting an exclusively Democratic or Republican or other limited ballot. And the voter can choose candidates from some parties for some positions, others for other positions, a process known as "ticket-splitting."[5]

Presidential primaries are different. If a major party so requests, voters requesting a party-specific ballot get a separate ballot listing candidates only of that party.[6] Nonaffiliated voters get ballots listing candidates of all parties.[7] These different kinds of ballots have to be "readily distinguishable," the results reported separately, and a major party can allocate delegates using the partisan ballots under its own rules.[8]

In the case before us, the Democratic Party of Washington sued the Secretary of State for a declaratory judgment that the blanket primary was unconstitutional and an injunction enabling the Party to "limit participation" in partisan primaries. The Republican Party successfully moved to intervene as a plaintiff, seeking similar declaratory relief and an injunction likewise requiring the Secretary of State to implement a mechanism to "effectuate the

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[4] Wash. Rev. Code § 29.30.095.

[5] Wash. Rev. Code § 29.18.200.

[6] Wash. Rev. Code § 29.19.045.

[7] *Id.*

[8] Wash. Rev. Code § 29.19.055.

Party's exercise of its right to limit participation in that primary." Numerous individuals joined both complaints as plaintiffs. The Libertarian Party also intervened, likewise seeking a declaratory judgment of unconstitutionality, and an injunction with terms focusing upon its interests as a small party. The Washington State Grange intervened as a defendant, supporting the blanket primary system as is.

Pursuant to stipulation, the 2000 primary was held under the existing statutory system. Though a preliminary injunction would have limited subsequent primaries in accord with the parties' complaint, the district court dissolved the injunction on July 24, 2001. The case then went forward on cross motions for summary judgment. The district court granted the State of Washington's motions to strike the declarations of witnesses put forward by the Democrats and Republicans, and denied the political parties' motions for summary judgment on the ground that they had not demonstrated evidence of a substantial burden to their First Amendment right of association. The district court granted the defendants' motion for summary judgment on the ground that the political parties had failed to meet their burden of proof. The political parties now appeal both the evidentiary rulings and the grant of summary judgment.

II. ANALYSIS

We review de novo the district court's grant of summary judgment.[9]

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[9] *Oliver v. Keller,* 289 F.3d 623, 626 (9th Cir. 2002).

A. Res Judicata

The Grange argues that we should affirm the judgment on the ground that the constitutional issues are res judicata. The Washington State Supreme Court upheld the blanket primary against challenges by individuals in 1936[10] and 1980.[11] The district court rejected this argument, and so do we. Obviously, res judicata does not apply because none of the plaintiffs were parties or in privity with parties to those cases, and constitutional law has changed materially since then,[12] most notably for purposes of this case when *Democratic Party v. Jones* came down in 2000.

B. Strict Scrutiny

The complexity of the relationship among private, state, and federal regulations of state elections has grown through a long series of decisions beginning with those rejecting the white-only Democratic primaries in the South,[13] continuing through to the present day in *Bush v.*

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[10] *Anderson v. Millikin,* 186 Wash. 602, 59 P.2d 295, 296-97 (1936).

[11] *Heavey v. Chapman,* 93 Wash. 2d 700, 611 P.2d 1256, 1259 (1980).

[12] *Montana v. United States,* 440 U.S. 147, 161-62, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979) (past judgments need not be given preclusive effect if there has been a significant intervening change of law). *See also Kennedy v. City of Seattle,* 94 Wash. 2d 376, 617 P.2d 713, 715-16 (1980) (issues may be of sufficient public importance to bar the use of collateral estoppel).

[13] *See, e.g., Nixon v. Herndon,* 273 U.S. 536, 47 S. Ct. 446, 71 L. Ed. 759 (1927); *Nixon v. Condon,* 286 U.S. 73, 52 S. Ct. 484, 76 L. Ed. 984 (1932); *Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944); *Terry v. Adams,* 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953). Subsequently, constitutional law as applied to primary elections

(Continued on following page)

Gore.[14] Fortunately, it is no longer necessary to parse this entire body of law, because the Supreme Court recently spoke to the precise problem at issue in this case. *California Democratic Party v. Jones*[15] held unconstitutional a California blanket primary scheme. The case at bar turns on whether the Washington scheme is distinguishable from the California scheme held in *Jones* to violate the right of free association.

The Secretary of State argues that the district court properly excluded the Democratic and Republican Parties' evidence, and without it, the Parties fail to meet what the Secretary claims is their burden of proof to show that they are harmed.

It is not at all clear that the plaintiffs had any "burden of proof" that they needed to bear. There is no standing or case or controversy issue. This is a facial challenge to a statute burdening the exercise of a First Amendment right. The challenge is brought by those wishing to exercise their rights without the restraints imposed by the statute. In *Jones,* the Court read the state blanket

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has developed significantly with respect to the state's relationship to political parties outside of the racial context as well. *See, e.g., Rosario v. Rockefeller,* 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973); *American Party of Texas v. White,* 415 U.S. 767, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1974); *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 101 S. Ct. 1010, 67 L. Ed. 2d 82 (1981); *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986); *Eu v. San Francisco Democratic Comm.,* 489 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989); *Burdick v. Takushi,* 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

[14] 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000).

[15] 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000).

primary statutes, determined that on their face they restrict free association, accordingly subjected them to strict scrutiny, and only then looked at the evidence to determine whether the state satisfied its burden of showing narrow tailoring toward a compelling state interest. The Supreme Court does not set out an analytic scheme whereby the political parties submitted evidence establishing that they were burdened. Instead, *Jones* infers the burden from the face of the blanket primary statutes. We accordingly follow the same analytic approach as *Jones*.

The Washington scheme is materially indistinguishable from the California scheme held to violate the constitutional right of free association in *Jones*. They are both "blanket" primaries. *Jones* carefully distinguishes blanket primaries, in which a voter can vote for candidates of any party on the same ballot, from an "open" primary where the voter can choose the ballot of either party but then is limited to the candidates on that party's ballot.[16] Obviously the blanket primary is also different from a "closed" primary in which only voters who register as members of a party may vote in primaries to select that party's candidates.[17] *Jones* also distinguishes the "*nonpartisan* blanket primary" in which voters can vote for anyone on the primary ballot, and then the top vote-getters regardless of party run against each other in the general election.[18]

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[16] *See id.* at 576, n. 6, 120 S. Ct. 2402.

[17] *See id.* at 570, 120 S. Ct. 2402.

[18] *Id.* at 585-86, 120 S. Ct. 2402.

The Washington statutory framework is a straight blanket primary, not an open, closed or nonpartisan blanket primary. Washington argues that its scheme should be distinguished from California's on two grounds. First, California registers voters by party but Washington does not. Second, as the State's brief puts it, because of its non-partisan registration, the winners of the primary "are the 'nominees' not of the parties but of the electorate."[19] Thus, the State argues, its primary is a "*nonpartisan* blanket primary"[20] that under *Jones* does not violate the parties' associational rights.

These are distinctions without a difference. That the voters do not reveal their party preferences at a government registration desk does not mean that they do not have them. The Washington scheme denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party.

Also, those who actively participate in partisan activities, including activities such as holding precinct caucuses in their homes, serving on local and state party committees, contributing money to their parties, canvassing, and watching polls for their parties, have a First Amendment right to further their party's program for what they see as good governance. Their right to freely associate for this purpose is thwarted because the Washington statutory scheme prevents those voters who share their affiliation from selecting their party's nominees. The

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[19] Brief of Appellee Sam S. Reed at 46.

[20] *Jones*, 530 U.S. at 585, 120 S. Ct. 2402 (emphasis in original).

right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapes. Party adherents are entitled to associate to choose their party's nominees for public office. As for the State of Washington's argument that the party nominees chosen at blanket primaries "are the 'nominees' not of the parties but of the electorate,"[21] that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees.

The First Amendment protects the right of freedom of association with respect to political parties,[22] and this right includes "the right not to associate."[23] "In no area is the political association's right to exclude more important than in the process of selecting its nominee."[24] The nominee is "the party's ambassador to the general electorate in winning it over to the party's views,"[25] and the blanket primary "forces petitioners to adulterate their candidate-selection process – the 'basic function of a political party' – by opening it up to persons wholly unaffiliated with the party."[26] Even "a single election in which the party nominee is selected by nonparty members could be enough to destroy the party,"[27] as would have been the case had opponents been able to swamp the Republican Party in

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[21] Brief of Appellee Sam S. Reed at 46.

[22] *Jones,* 530 U.S. at 574, 120 S. Ct. 2402 (quoting *Tashjian,* 479 U.S. at 214-15, 107 S. Ct. 544).

[23] *Id.* at 574, 120 S. Ct. 2402.

[24] *Id.* at 575, 120 S. Ct. 2402.

[25] *Id.*

[26] *Id.* at 581, 120 S. Ct. 2402 (internal citation omitted).

[27] *Id.* at 579, 120 S. Ct. 2402.

1860 and force it to nominate a proslavery candidate rather than Abraham Lincoln.[28] "Unsurprisingly, [the Supreme Court's] cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences."[29]

Thus under *Jones* the Washington blanket primary system is materially indistinguishable from the California blanket primary system and is unconstitutional unless the defendants bear their burden of demonstrating that "it is narrowly tailored to serve a compelling state interest."[30]

C. State Interests

In *Jones,* the State of California put forth seven different state interests that it claimed could justify the use of a blanket primary. The Court rejected all of them as less than compelling.[31] The defendants in this case assert some of the same interests that the Court categorically rejected. This "determination is not to be made in the

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[28] *Id.* (citing 1 Political Parties & Elections in the United States: An Encyclopedia 398-408, 587 (L. Maisel ed. 1991)).

[29] *Id.* at 575, 120 S. Ct. 2402 (internal citations and quotation marks omitted).

[30] *Id.* at 582, 120 S. Ct. 2402.

[31] *Jones,* 530 U.S. at 584, 120 S. Ct. 2402 ("Respondents' remaining four asserted state interests – promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy – are not, like the others, automatically out of the running; but neither are they, *in the circumstances of this case,* compelling.") (emphasis in original).

abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant."[32]

Defendants argue that (1) the blanket primary "promotes fundamental fairness because it permits all voters, regardless of party affiliation, to participate in all stages";[33] (2) "all the voters should help choose the nominees for all offices" to provide maximum choice;[34] and (3) the blanket primary affords voters "full participation in the election process without forcing them to publicly reveal their political party affiliation."[35] The first two amount to the same interest California urged in *Jones,* categorically rejected because "a nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications."[36] Providing increased "voter choice" "is hardly a compelling state interest, if indeed it is even a legitimate one."[37] The supposed unfairness of depriving those voters who do not choose to affiliate with a party from picking its nominee "seems to us less unfair than permitting nonparty members to hijack the party."[38]

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[32] *Id.* (emphasis in original).

[33] Brief of Appellee Sam S. Reed at 50.

[34] *Id.*

[35] *Id.* at 52.

[36] *Jones,* 530 U.S. at 583, 120 S. Ct. 2402 (quoting *Tashjian,* 479 U.S. at 215-16 n. 6, 107 S. Ct. 544) (citations and quotation marks omitted).

[37] *Id.* at 584, 120 S. Ct. 2402.

[38] *Id.*

The third proposed interest – privacy – has to be rejected as well. In *Jones,* the Supreme Court held that "we do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a 'compelling' one."[39] Washington law expressly requires the State to provide the parties, upon request, with the partisan affiliations expressed by voters in the presidential primary.[40] It is only in general elections that the Washington Constitution broadly protects voters' secrecy as to their partisan preferences. Primaries are distinguishable, under the Washington Constitution, because "[i]t is not the purpose of the primary election law to elect officers."[41]

Washington also argues that its blanket primaries promote "increased voter participation by giving all voters the sense that their votes 'count' in every stage of the election process."[42] *Jones* rejects the voter participation argument on the ground that it is "just a variation on the same theme (more choices favored by the majority will produce more voters) and suffers from the same defect" as the State's arguments that "fairness" requires that unaffiliated voters participate in the primary elections.[43] The State's argument that it has a compelling interest in

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[39] *Id.* at 585, 120 S. Ct. 2402.

[40] Wash. Rev. Code § 29.19.055.

[41] *State ex rel. Zent v. Nichols,* 50 Wash. 508, 97 P. 728, 731 (1908). *See* Wash. Const. art. VI, § 8 (" . . . the elections for such state officers shall be held in every fourth year . . . on the Tuesday succeeding the first Monday in November.").

[42] Brief of Appellee Sam S. Reed at 51.

[43] *Jones,* 530 U.S. at 584-85, 120 S. Ct. 2402.

preserving its sovereign "right to determine how public officers will be chosen" is insufficiently specific to function as a compelling state interest. While of course a State may impose time, place, and manner restrictions on a primary election,[44] those restrictions may not infringe on Constitutional rights, as the blanket primary system imposed by the State of Washington does.

There is one more argument that the State makes, which is in substance the same one the Grange makes. As the State puts it, the blanket primary "recognizes the associational interests of groups other than political parties" by enabling voters to "form ad hoc political associations which cross party lines to support a particular candidate or a particular cause."[45] The Grange argues that Grange members support water and public utilities for farms and that its members' rights to advance their rural agenda in both parties will suffer if each Granger is forced to choose a party ballot.[46] The Grange says that it spearheaded the initiative in 1933 that led Washington to adopt the blanket primary, which has successfully prevented "a politically corrupt nominating process controlled by political bosses or special interests."[47]

"Special interests" are evidently in the eye of the beholder. Some urban voters might think that special protection for rural water and electricity concerns serve a

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[44] U.S. Const. Art. I, § 4, cl. 1. *See also Burdick,* 504 U.S. at 433, 112 S. Ct. 2059.

[45] Brief of Appellee Sam S. Reed at 52.

[46] Brief of Appellee-Intervenor Washington State Grange at 25.

[47] *Id.*

"special interest" of farmers, and that the Grange is a special interest group. There is nothing corrupt about promoting such protection, nor is there anything corrupt about organizing a party agenda that does not provide special protection for these interests. The members of the Grange have a First Amendment right to control its membership and message so that it is not swamped by new members with some urban or foreign policy agenda. Likewise, the people in the Democratic, Republican, and Libertarian Parties have First Amendment rights to control their nominating processes so that they are not controlled by Grangers.

This special interest argument is materially indistinguishable from the first one the Court rejected in *Jones*. California had urged that the blanket primary produced nominees "who better represent the electorate" and go beyond "partisan concerns," because blanket primaries "compel candidates to appeal to a larger segment of the electorate."[48] The Court analogized this to requiring the South Boston Allied War Veterans Council to allow "an organization of openly gay, lesbian and bisexual persons" to march in their St. Patrick's Day Parade,[49] and, like that, the object of the California blanket primary was to require speakers to substitute someone else's message for their own, which "the general rule of speaker's autonomy forbids."[50] The remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates carrying a message adverse to their

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[48] *Jones*, 530 U.S. at 582, 120 S. Ct. 2402.

[49] *Id.* at 582-83, 120 S. Ct. 2402.

[50] *Id.* at 583, 120 S. Ct. 2402.

interests is to vote for someone else, not to control whom the party's adherents select to carry their message.

Appellants also challenge the district court's evidentiary rulings, which struck much of the evidence they submitted. We need not reach the evidentiary questions, because even without the evidence, appellants are entitled to prevail. This case presents a facial constitutional challenge, and the Washington blanket primary statute is on its face an unconstitutional burden on the rights of free association of the Democrats, Republicans and Libertarians who have brought this suit.

We REVERSE and REMAND for entry of summary judgment, declaratory judgment, and an injunction in favor of the appellants.

ENTERED ON DOCKET
MAR 27 2002
By Deputy //s//

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA[1]

DEMOCRATIC PARTY WASHINGTON STATE, *et al.*,

Plaintiffs,

v.

SAM REED, as Secretary of State of the State of Washington, *et al.*,

Defendants.

REPUBLICAN STATE COMMITTEE OF WASHINGTON, *et al.*,

Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, *et al.*,

Intervenors,

WASHINGTON STATE GRANGE, *et al.*,

Intervenors.

Case No. C00-5419FDB

ORDER GRANTING DEFENDANTS' M0TION FOR SUMMARY JUDGMENT and DENYING PLAINTIFFS DEMOCRATS' and INTERVENORS REPUBLICANS' MOTIONS FOR SUMMARY JUDGMENT

(Filed Mar. 27, 2002)

[1] Grammatical, punctuation, and/or spelling errors in the original order have been retained. The pages in the table of contents have been altered to reflect the proper pages in the smaller United States Supreme Court booklet format.

WASHINGTON STATE DEMOCRATIC PARTY V. REED, et al. No. C00-5419FDB

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INTRODUCTION

This matter is before the Court on cross-motions for summary judgment filed by Plaintiffs, Washington State Democratic Party, *et al.* (hereafter Democratic Party); Defendants Sam S. Reed, as Secretary of State, *et al.* (hereafter Reed, Secretary of State, State, or Defendants);

and Intervenors Republican Party of The State Of Washington, *et al.* (hereafter Republican Party).

Intervenors Libertarian Party of Washington State, *et al.* (hereafter Libertarian Party) and Intervenors Washington State Grange, *et al.* (hereafter The Grange) have filed responsive memoranda, as have the other parties to each of the summary judgment motions. The motions are ready for the Court's consideration.

Defendant Reed has filed three motions to strike certain declarations submitted by the Democratic and Republican parties, and these, too, are at issue and ready for the Court's consideration.

On March 8, 2002, the Court held oral argument on the summary judgment motions. The Plaintiffs, Defendants, and Intervenors participated in oral argument, and they presented their views and responded to questions from the Bench. The Grange submitted a document, marked in evidence, that further supported its case. While the Grange said that it could submit further evidence should the Court hold a full trial, it admitted that such evidence would merely reinforce what it has already presented. The other parties were in agreement that this matter is ready for the Court's decision on the cross motions for summary judgment.

The Democratic Party seeks a declaratory judgment that Washington State's blanket primary election system is unconstitutional because it imposes a severe burden on the First Amendment rights of the Party and its members and because the primary system either does not advance a compelling state interest or, to the extent that it does, there are other, less burdensome alternatives to advance those interests. The Democratic Party contends that the

votes of those affiliated with the Party are substantially diluted by the votes of those who refuse to affiliate with the Party, or who are openly affiliated with the Republican party. As a result, contends the Democratic Party, election outcomes are altered, and the Democratic candidates who survive the blanket primary do not address Democratic issues in government to the extent that they would if they had to achieve re-nomination in a process in which Democratic votes were not diluted by the votes of non-Democrats.

The Republican Party argues that this case presents a straightforward issue of the application of clear U. S. Supreme Court precedent to uncontested material facts. The Republican Party states that the essential, uncontested facts are that Washington's blanket primary forces the Republican Party to have its standard-bearers in the general election chosen not only by Republicans, but also by Democrats, independent voters, and third party voters, thus altering the message of Republican candidates. The Republican Party argues that this adulteration of the Republican Party's message and candidate selection process, alone, is sufficient for the blanket primary to be an unconstitutional invasion of First Amendment rights.

Defendant Secretary of State Reed argues that the Constitution does not vest political parties with the right to dictate the manner in which the voters select candidates for public office, and that voters in Washington do not participate in the primary as party members or affiliates, but as the general electorate winnowing the field and choosing nominees to qualify for the general election ballot. Furthermore, Secretary of State Reed argues that the evidence submitted by the political parties is insufficient to

satisfy their burden of showing that Washington's election system is unconstitutional.

The Grange Intervenors oppose the summary judgment motions of the political parties arguing that the political parties have failed in their proof and that they likewise lose a test balancing the arguable impacts on the political parties' associational right with the legitimate, compelling interests protected and advanced by Washington's unique election system. The Grange argues that their First Amendment rights as a non-partisan association advance their political interests best in this system allowing them to vote for candidates from either party.

The Libertarian Party opposes Defendant Secretary of State Reed's motion for summary judgment arguing that because it is smaller than the two major parties, its ability to preserve its core political values and advanced its political message is at greater risk. The Libertarian Party had a right to nominate its own candidates until the 2000 election, but now as a fledgling major party, it has not been shown that it has the ballot strength to preserve the integrity of its message or to withstand the dilution of its ballot strength by multiple persons filing as Libertarian candidates who may not be affiliated with or sympathetic to the goals and messages of the party. Furthermore, the Libertarian Party argues that it does not need opinion testimony to demonstrate harm that the harm, or risk of harm is obvious.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the moving party establishes that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Fed.

R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). Summary judgment is proper if a defendant shows that there is no evidence supporting an element essential to a plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Failure of proof as to any essential element of plaintiff's claims means that no genuine issue of material fact can exist and summary judgment is mandated. *Celotex*, 477 U.S. 317, 322-23 (1986). The nonmoving party "must do more than show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The substantive law governs whether or not a fact is material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Inferences drawn from the facts are viewed in favor of the non-moving party. *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630-31 (9th Cir. 1987). All reasonable doubts as to the existence of a material fact are resolved against the moving party. *Id.* at 631. Summary judgment is not appropriate if the credibility of witnesses is at issue. *Securities and Exchange Comm. V. Koracorp Industries, Inc.*, 575 F.2d 692, 699 (9th Cir.), *cert denied*, 512 U.S. 1236 (1994).

The party alleging the unconstitutionality of a statute has the burden of proof. A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509, U.S. 312, 320 (1993), citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

III. DISCUSSION

A. LEGAL BACKGROUND

The issue before the Court is whether Washington's blanket primary is unconstitutional in view of the Supreme Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). That case addressed the issue of whether California's primary system unconstitutionally burdened the political parties' First Amendment right of association. This right of association, derived from freedom of speech and assembly, was clearly announced in *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958): "[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.." The Supreme Court held in *California Democratic Party*:

> In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process – the "basic function of a political party," *ibid.* – by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome – indeed, in this case the *intended* outcome – of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.

530 U.S. at 581-82. The Supreme Court then turned to the seven state interests claimed to be compelling.

The Supreme Court found two of the asserted interests – producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns – to be no more than circumlocutions for producing nominees and nominee positions

other than those the parties would choose. The third interest – ensuring that disenfranchised persons enjoy the right to an effective vote – was seen as being merely a recharacterization of the nonparty members' keen desire to participate in selection of the party's nominee as "disenfranchisement" if that desire is not fulfilled. The Court said that the "disenfranchised" voter was actually a voter who was not a member of the majority party in a "safe" district. The four remaining interests – promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy – "are not, like the others, automatically out of the running; but neither are they *in the circumstances of this case*, compelling." 530 U.S. 584 (emphasis in the original). The Court said that the determination of whether these asserted state interests are compelling

> . . . is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant.

530 U.S. at 584 (emphasis in original).

The Court then found all four of the asserted state interests not to be compelling. The Court saw the fairness issue as relating to the perceived inequity of nonparty members in "safe" districts not being allowed to determine the party nominee; the Court saw that "inequity" as less unfair, if it was unfair at all, than "permitting nonparty members to hijack the party." *Id.* The matter of affording voters greater choice failed because "it is obvious that the net effect of this scheme – indeed, its avowed purpose – is to *reduce* the scope of choice, by assuring a range of candidates who are all more "centrist." *Id.* (emphasis in original).

This resulted in the range of choices favored by the majority of voters being increased. The interest of increasing voter participation was a variation on the greater choice theme and suffered from the same defect, in the Court's view. Finally, the Supreme Court did not think that the privacy interest, the confidentiality of one's party affiliation, could be considered in all cases to be a "compelling" one, reasoning that "[I]f such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices." *Id.* at 585. In conclusion, the Supreme Court said that even if all four interests were compelling, Proposition 198 was not a narrowly tailored means of furthering them.

The Court then went into a description of a type of primary that would protect these interests, a *nonpartisan* blanket primary. Under such a primary, the state determines the qualifications required for a candidate to have a place on the primary ballot – nomination by established parties, voter-petition requirements for independent parties – then each voter, regardless of party affiliation, may vote for either candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. In the Court's view, this system

> "has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness" – all without severely burdening a political party's First Amendment right of association."

Id. at 585-86.

B. WASHINGTON'S PRIMARY

In analyzing whether Washington's primary election system impermissibly burdens political parties' associational rights, it is important to understand Washington's primary system as compared with that of California against the background of the Supreme Court's reasoning. Washington's historical perspective is relevant as well when analyzing Washington's primary, because the State's interests in this blanket primary are animated by the electorate's evident desires over a long period of time.

The United States Constitution leaves it to the states to regulate elections. The Elections Clause of the United States Constitution, Art. I, § 4, cl. 1, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." The states also have broad control over the election process for state offices. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). Nevertheless, this "state action" in regulating elections must be informed by other Constitutional provisions such as those contained in the First and Fourteenth Amendments.

California Democratic Party described the California system. In California, a candidate for public office gains access to the general election ballot by winning a political party's primary or by filing as an independent and receiving a certain percentage of votes. Party membership is defined through public registration. Until 1996, California held "closed" partisan primaries, in which only persons who were members of the political party – those who declared their affiliation when they registered to vote – could vote on the party's nominee. In 1996, via Proposition

198, California changed its closed primary to a blanket primary. After 1996's Proposition 198, each voter, rather than receiving a ballot with candidates of his own declared party, received a ballot that listed every candidate regardless of party affiliation and allowed the voter to choose freely among them. It remained the case that the partisan candidate receiving the greatest number of votes is the nominee of that party at the ensuing general election.

In Washington, there is no provision for registering voters by party affiliation. (*RCW 29.07.070 Voter qualification information – Verification notice*) A candidate who desires to have his or her name printed on the ballot for election to office other than president or vice president of the United States must file a declaration and affidavit of candidacy, and among other things, shall indicate a party designation, if applicable. (*RCW 29.15.010 Declaration and affidavit of candidacy*) A candidate for a partisan office qualifies for having his name on the general election ballot if that candidate receives at the primary election at least one percent of the total number of votes cast for all candidates for that position and a plurality of the votes cast for the candidates of his or her party for that office. (*RCW 29.30.095, Partisan candidates qualified for general election*)

Political parties are much more in the forefront under California's election law. For example, in Washington, while a candidate for office indicates, if applicable, a party designation, in California, a candidate must present a declaration of candidacy, which will not be filed unless the candidate shows in his affidavit of registration that he has been continuously registered as being affiliated with the political party the nomination of which he seeks for at least three months immediately prior. (Cal. Elect. Code

§ 8001) An elections official attaches a certificate to the candidate's declaration showing the date on which the candidate registered his or her affiliation with the political party the nomination of which is sought, and indicating, furthermore, that the candidate has not been affiliated with any other qualified political party for the three-month period specified. *Id.* Thus, California election law provided that at the primary, a candidate had to pass some muster in demonstrating that he or she was among the party faithful. Then, until 1996, the voters who had declared in their registration forms that they were affiliated with a particular political party (Cal. Elect. Code § 2150) would receive a ballot consisting only of candidates of that political party, and they would then vote for their choice. The candidate who received the highest number of votes for each office would become the nominee of that party in the ensuing general election. Thus, for the ensuing general election, Democrats chose their standard bearers for each office and Republicans chose their standard bearers.

Then an initiative statute was adopted following the voters' March 1996 adoption of Proposition 198. The initiative backers promoted the blanket primary largely as a measure that would "weaken" party "hard-liners" and ease the way for "moderate problem-solvers." *See California Democratic Party*, 530 U.S. at 570. Thereafter, all persons entitled to vote, including those not affiliated with any political party, were allowed to vote for any candidate regardless of the candidate's political affiliation. The result was that known, registered Democrats and known, registered Republicans were allowed to vote for any Republican or Democrat or other candidate. The partisan candidate receiving the most votes at the primary became the nominee of that political party at the ensuing general election

regardless of the party affiliation of voters who voted for that candidate.

In Washington, unlike California, a candidate for a partisan office need not first pass muster with a political party to which he chooses to align; the candidates simply self-declare their affiliation. Voters are not required to declare openly affiliation with one party or another in order to vote. This system is like the nonpartisan blanket primary described by the majority in *California Democratic Party*, except that rather than the top two (or other number) of vote getters moving on to the general election, Washington election laws allow those candidates receiving at least 1% of the total votes cast for all candidates for that position and a plurality of the votes cast for the candidates of his or her party for that office to advance to the general election ballot.

Two provisions of the Washington Constitution are relevant to the overall circumstances: (1) All qualified voters are entitled to vote at all elections. Wash. Const. Art. VI, § 1. (2) "All elections shall be by ballot. The Legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and deposing his ballot." Wash. Const. Art. VI, § 6.

The Grange Intervenors provided some historical information. Importantly, and distinct from California, Washington has never required voters to register by political party. The Washington Legislature passed a law in 1922 that would have required all voters to register by political party, but a constitutional referendum was immediately filed, and Referendum Measure 14 (1922) overwhelmingly – 2.5:1 against – rejected the law providing for party resignation. The Washington Legislature also

tried to adopt a system of "party primaries," including a loyalty oath requirement and giving political parties access to a list of voters participating in their primary. Again, a referendum petition was filed, and at the ensuing election, Referendum 15 (1922) was adopted and the "party primary" and list law was rejected by more than 2.5:1.

In 1933, the Grange, with support from other associations, circulated for voter signatures and qualified the "blanket primary" initiative. In 1934, the Legislature voted to enact the initiative and adopted the blanket primary system. (Washington's Initiative No. 2 and 1935 Lash. Law. Ch. 26) The Washington blanket primary statute having been enacted by the State Legislature, does not suffer from the same infirmity – being enacted by popular initiative alone – that concerned the dissent in *California Democratic Party*, 530 U.S. at 602-03.

Since the Washington Legislature adopted the blanket primary, there have been legal challenges to the system and a jurisprudential history has developed that further elucidates the background circumstances in Washington. *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936) upheld the constitutionality of Washington's blanket primary. *Anderson* held that as to the general objection that the law tends to destroy political parties, there is no concern of political parties in the constitution; the people in adopting both the state and federal constitutions went no further than to protect the elector in his right to cast a ballot; not a coerced party ballot, but for the candidate of his choice, whether he be upon one ballot or another. "Finding no guaranty, express or implied, in favor of either a candidate or a party in the constitution, it follows that he or his party can claim no greater rights than the voter

himself. The fountain cannot rise higher than its source." 186 Wash. at 606. The *Anderson* court also addressed an associational rights issue with an interesting point of view. The Court said that as to the argument that without the party test, those votes so inclined may elect Democrats as Republican precinct committeemen and vice versa,

> . . . [i]t is not to be presumed that any voter will abandon his right to participate in the selection of the committeeman of his own party in order to foist an unwanted individual upon a party to which he is opposed. But whether so or not, the provisions now under consideration apply equally to all parties who may be affected thereby, and thus there is no discrimination in favor of or against any.

Id. at 607-08.

Next, there was *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980), which presented the question of whether the blanket primary (RCW 29.18.100 and those statutes implementing it RCW 29.30.010, .030) unconstitutionally restrict the plaintiffs' right of association under the state and federal constitutions. A unanimous Washington State Supreme Court held that they do not. The *Heavey* Court asked whether the Plaintiffs (a political party and two of its members) have shown a substantial burden and answered:

> Not only have they not shown a substantial burden, but they concede they cannot do so. Plaintiffs seek to avoid establishing a substantial burden by asserting the court places a "burden of negative proof" on them to which they cannot respond because voter ballots are made secret by another separate state action, the secret ballot. Plaintiffs suggest we abandon the substantial

> burden test and instead adopt what they term the "modified review standard."

93 Wn.2d at 702-03. The Court declined to adopt the modified review standard and said that "we believe the failure of plaintiffs even to attempt to show a substantial burden to their right of association is dispositive of the case." *Id.* at 703. The Court stated: " . . . at the very least those who would overturn statutes on constitutional grounds should offer some evidence they have been harmed. Mere assertions of injury do not make for the violation of constitutional rights." Finally, the Court held that even though the case failed for failure to demonstrate a substantial burden to their association rights, there were certain compelling state interests that support a blanket primary: allowing each voter to keep party identification secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary. The Court saw the purpose of the statute stated in RCW 29.18.200 to allow:

> All properly registered voters [to] vote for their choice at any primary election, for any candidate for each office regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter.

Id. at 705. This purpose contrasts sharply with that of California's Proposition 198, which was, the Supreme Court observed: "Promoted largely as a measure that would 'weaken' party 'hard-liners' and ease the way for 'moderate problems solvers'." *California Democratic Party*, 530 U.S. at 570. The Court concluded that the correction of any defects should be left to the legislature or popular initiative. *Id.*

The question is, under these circumstances, does Washington's primary system impermissibly burden the associational rights of the political parties.

C. EVIDENCE ON ISSUE OF BURDEN ON RIGHT OF ASSOCIATION

The political parties must demonstrate to the Court that Washington's primary election laws place a substantial burden upon their First Amendment right of association. *See American Party v. White*, 415 U.S. 767 (1974); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988). Whether a burden on a party's associational rights is substantial is a question of law. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 109 S. Ct. 1013, 1018-21 (1989).

The Democratic Party describes its view of the burden placed on political parties by Washington's blanket primary; it claims that the system forces the Party to adulterate its candidate selection process, to have its message changed, and potentially to have the outcome of its primaries altered, and that this burden is the heaviest imaginable. This is, essentially, the burden described by the Republican Party, as well. The Libertarian Party sees the same burdens upon it now that it has moved from minor party to major party status, but sees these burdens as rendering even greater dangers because the Party is yet small.

Through various witnesses, the political parties assert evidence of a substantial burden on their associational rights. The State and the Grange submit evidence on their behalf as well. Some of the expert testimony submitted is the subject of motions to strike on a variety of bases.

1. Expert Testimony – Michael Snyder, Todd Donovan, Ph.D. and David J. Olson, Ph.D.

In support of their contentions of a substantial burden on their associational rights, the Democratic and Republican Parties rely on testimony of Michael Snyder, whom they present as their expert, as well as the testimony of other individuals.

The State and the Grange rely on the testimony of Professor Todd Donovan and Professor David J. Olson.

The State and the Grange challenge the testimony of Michael Snyder on two bases: (1) he lacks the professional qualifications to give expert testimony, and (2) his report fails to satisfy at least two parts of the three-part test set forth in Fed. R. Evid. 702 for expert witnesses. Each of these challenges will be discussed in turn.

a. The Experts' Qualifications

Mr. Snyder summarized his education and professional experience in his curriculum vitae. He has a Bachelor of Arts in history and did some post-graduate study of Eastern European history, but did not receive a post-graduate degree. (Snyder Dep. p. 6) He testified at his deposition that he sat in on some political science classes, although he doesn't have any direct recollection of it. (*Id.* p. 7) He stated that he took one class in statistics. (*Id.* p. 6) His work experience includes work on two political campaigns for two different candidates in the Midwest and for the Washington State Democratic Campaign and Caucus as a "Phone Bank Director" involving volunteer callers in one case and paid callers in another wherein he wrote "scripts," trained the callers, did polling, and "voter i.d."

He describes his work for the Washington Democratic Campaign and Caucus in September 1990 to April 1991 as involving legislative analysis and constituent relations. He also worked for a Washington consulting company with clients nationwide, where he did a variety of things including copy writing, speech writing, and "targeting," that is, analyzing election data, voter registration, election results. He is currently an independent consultant in Washington doing strategic planning and election analysis, research, and writing.

Defendant Secretary of State Reed and the Grange argue that Mr. Snyder does not have the requisite professional qualifications to give expert testimony; that Michael Snyder may have experience as a campaign consultant, but that he does not have the broad analytical background he would need to express opinions on such a broad topic as the effect of the blanket primary on political parties.

It is true that Michael Snyder lacks training in political science or in statistics, relevant study areas to address the issues in this case. Short of concluding that Mr. Snyder is unqualified as an expert in this case, the best that can be said is that he lacks the experience, the educational stature, and credentials to be authoritative in his opinions.

In contrast, Todd Donovan, Ph.D. (hereafter Dr. or Professor Donovan), is a professor of political science at Western Washington University, and his teaching areas are American politics, state and local politics; parties, campaigns and elections; comparative electoral systems; research methods and statistics (introductory level). His research areas are electoral systems and representation, political behavior, sub-national politics, direct democracy,

political economy of local development. He is widely published, with books, book chapters, edited volumes, and articles in academic journals to his credit. Dr. Donovan's credentials render him an authoritative expert in this case. While the Democratic Party argues that Dr. Donovan's report ought to be excluded because it was late, nevertheless, the delay did not cause harm to the political parties who were able to take his deposition on November 7 and they questioned him about all aspects of his report. Dr. Donovan is qualified as an expert and his report will not be excluded.

David J. Olson, Ph.D. (hereafter Dr. or Professor Olson) is presently a Professor in the Political Science Department at the University of Washington. As reflected in his Curriculum Vitae, he has a large number of books and articles to his credit, he reviews manuscripts for a variety of journals and agencies, he regularly gives speeches, and he has been active as a consultant since 1980. Dr. Olson is certainly qualified as an expert to testify on the matters at issue in this case.

b. Expert Opinion – Federal Evidence Rule 702

Secretary of State Reed and the Grange contend that Mr. Snyder's report fails most of the five factors of the test from *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (one of three cases that prompted the revision of Fed. R. Evid. 702 into its present form); they also contend that Mr. Snyder's report fails at least two parts of the three-part test of Fed. R. Evid. 702. Federal Evidence Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Daubert set forth a list of non-exclusive factors to be considered in evaluating scientific expert testimony: (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review or publication; (3) the known or potential rate of error of the theory or technique when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or method has been generally accepted in the scientific community. *Daubert*, 509 U.S. at 593-94. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) clarified *Daubert* to include the Court's "gatekeeper" role the screening of all proposed experts and their work, not just those advancing scientific opinions. In *General Electric Co. v. Joiner*, 522 U.S. 136, 146-47 (1997), the Court confirmed that challenges to the admissibility of expert opinions do not present issues of fact that would preclude summary judgment. The Court stated:

> Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that

> there is simply too great an analytical gap between the data and the opinion proffered.

General Electric, at 146, 118 S. Ct. 512, 519.

The political parties asked Mr. Snyder to determine "To what extent did nonmembers of the Democratic Party participate in contested Washington primaries in September 2000? To what extent did nonmembers of the Republican Party participate in contested Republican primaries in December 2000?" (Snyder Dep. pp. 18 and 19) The political parties gave Mr. Snyder a definition of what constituted party membership: "Members of the Democratic Party are defined as registered voters who participated in the February 2000 Washington presidential preference primary, and were issued a Democratic ballot," and they described members of the Republican Party similarly, referring to the February 2000 presidential preference primary. (Snyder Dep. at 19) Voters who were issued an unaffiliated ballot at the preference primary were not considered to be members of either the Democratic or Republican party. *Id.*

In the Plaintiffs' disclosures of expert testimony, Mr. Snyder's testimony is summarized: By comparing the ballot issuance records between the February 2000 presidential preference primary to the total votes recorded in a party's September 2000 primary, it is possible to determine whether more voters were allowed to participate in the party's primary than were known to be supporters of the party. In Mr. Snyder's "Preliminary Report Washington 2000 Blanket Primary Vote Analysis," he concludes that non-party voters – those who did not case that party's preference ballot in the 2000 presidential primary – participated in the 2000 Democratic and Republican

blanket primary nominations process, often, at all levels of government, and in some cases, such participation was decisive. *Id.* at 16. Further, Mr. Snyder concluded that Democrats and Republicans participated in each other's primary. *Id.*

Mr. Snyder's evidence does not pass the first and second tests of Fed. R. Evid. 702. Mr. Snyder did not make a determination of party membership based on an analysis of relevant data; he merely accepted a definition from the political parties. Then, he reached his conclusions by simply performing mathematical computations. Dr. Donovan pointed to two key flaws in Mr. Snyder's analysis: (1) he used an untenable definition of "member" of the Democratic and Republican Parties by assuming that the only voters who can be regarded as members of the parties are those voters who participated in the February 2000 Washington presidential preference primary and were issued ballots affiliated with those parties; and (2) he used data from the February 2000 presidential preference primary to make estimates of "non-party members" voting in the September 2000 state primary election. Dr. Olson's Statement discussed the issue of political party membership:

> In Washington, voters are not required to indicate party affiliation, adherence to a political party, or even party preference when registering to vote. As a matter of state statutory law, there is no legal basis for determining party membership in Washington State. And, under Washington's blanket primary system, which opens participation in selecting nominees for partisan offices to all registered voters, regardless of party preference, adherence or affiliation, there is no legal or organizational basis for determining party membership.

> In the absence of legal requirements to declare party affiliation when registering to vote, or requirements for paying dues to a party, or formally joining a party by signature, or making a public declaration of party adherence, there is no easy or clear way to define membership in political parties in Washington State. Instead, party affiliation in Washington is a psychological state of either identifying or not identifying with one or another of the major or minor political parties.

Statement of David J. Olson, Professor of Political Science, University of Washington, p. 4.

The Republican Party protests the idea that the definition of a political party should be left to a political scientist rather than to the political party itself. Similarly, the Democratic Party argues that

> [t]he State's preference that the Democratic Party organize itself in some other fashion or use some other eligibility requirement is not a basis for disregarding Mr. Snyder's testimony. The determination of how to structure the Party and who is eligible to participate in the Party's candidate selection process belongs to the Party, not the State or it academic experts.

Dem. Party Opp. Memo. at 18. This argument ignores the inherent problem with the political parties' definition of party membership in Washington.

In his declaration, Professor Donovan explained that the 2000 presidential preference primary presented a very biased picture of how voters are affiliated with parties in Washington. (Donovan Decl. at 4-6) For example, and among other things, the primary was weakly contested, as Vice President Gore had already locked up the Democratic

nomination before the Washington primary, so there was little incentive for Democrats to turn out. Thus, there would be a substantial under-estimate of the proportion of voters affiliated with the Democrats, and a biased estimate of Republican affiliates would also be produced. *Id.* Professor Donovan also goes on to state that the definition used in the Snyder report would never pass peer review in an academic journal, and that he knew of no study that has ever used this method. (Donovan Decl. ¶ 16) In his deposition, Professor Donovan testified that his definitions of party affiliation are used commonly in academic journals. (Donovan Dep. at 134; and see Prof. Donovan's "Report on the Consequences of Washington's Blanket Primary" at 1).

Besides using a nonstandard definition of party membership, Professor Donovan cited Mr. Snyder's use of noncomparable data – that is, that something that happened in February would be a measure of the partisan affiliations of voters in September – as another aspect of his report that would not pass peer review. (Donovan Dep. at 135) Professor Donovan was asked whether what Mr. Snyder did wasn't the same as what happened in California – where "they simply counted the votes and analyzed the data based on the registration that was shown on the ballot?" (*Id.* at 210) Dr. Donovan explained that "the act of registering, I would assume, is not biased by a particular election in a particular year, whereas the way that Snyder has done his, who is likely to sign in as a Democrat or Republican in that example is biased by that particular election context." (*Id.* at 211)

Before one can gauge the impact of a primary election system upon a party's associational rights, one must identify political party members. This identification was

easily done in California where voters must register their party affiliation, but the same is not true in Washington. The problem of identifying party members in Washington precludes a determination that those outside the party dilute the votes of those within the party. Professor Olson was questioned on this point in his deposition, and his answer highlights the problem:

> Q. Am I correct that you're unable to tell me whether, in this state, the vote of members of the Democratic Party in the Selection of their nominees – you're unable to tell me whether that vote is diluted by the presence or potential presence of independents and Republicans in that process?
>
> A. And the vote that's being diluted is the party members?
>
> Q. Yes.
>
> A. I don't know what "party members" means in the context of this question.

Olson Dep. at 45.

Mr. Snyder's Report is not based upon sufficient facts or data, and the testimony is not the product of reliable principles and methods. Mr. Snyder's mathematical calculations may be correct, but the serious flaws in his work, as discussed above and elaborated more fully in the reports and testimony of Professors Olson and Donovan, undermine it so as to render it worthless. Mr. Snyder's testimony must be excluded.

It is uncontested that Professors Olson and Donovan have submitted evidence in compliance with Fed. R. Evid. 702.

2. Other Testimony

The testimony of the Democratic Party's witnesses – Paul Berent, Blair Butterworth, and Don McConough – and the exhibits submitted with their declarations; the testimony of the Republican Party's witnesses – Christopher Vance, Dale Foreman, John Meyers, and Thomas Lowry – and the exhibits submitted with their declarations, are the subject of motions to strike made by the Secretary of State. The State argues that this testimony must be excluded because it includes opinions, and these witnesses were not designated as experts, nor were the required disclosures made pursuant to Fed. R. Civ. P. 26(b)(4) and Local CR 26(a)(2); their testimony is thus rendered inadmissible under Fed. R. Evid 702. Moreover, their opinions and conclusions are not supported by detailed supporting data. The State also argues that these witnesses may not give opinions based on "scientific, technical, or other specialized knowledge" as lay witnesses under Fed. R. Evid. 701. Finally, the State argues that the opinions lack foundation, appear to be based upon hearsay, in part, or are simple conclusions, or are speculative. Regarding Thomas Lowry's testimony, the State argues that his description of his candidacy and the reasons for it are irrelevant.

The Democratic Party argues that their witnesses were available for deposition, they were disclosed as experts, citing that they may produce evidence under Fed. R. Evid 702, 703, or 705, and that they were not required to produce the additional disclosure that is required by Fed. R. Civ. P. 26(a)(2)(B) because these witnesses were not "retained" or "specially employed" to provide expert testimony. The Republican Party makes a similar argument.

a. Expert Opinion – FRE 702 and Fed. R. Civ. P. 26(a)(2)(B)

The point of Fed. R. Civ. P. 26(a)(2)(B)'s requirement of a written report for testifying expert witnesses is to provide more substantive information as an aid in preparation to depose the expert. This requirement does not turn on whether the witness is paid a fee. "Rule 26 focuses not on the status of the witness but rather on the substance of the testimony." *Zarecki v. Nat'l R.R. Passenger Corp.*, 914 F. Supp. 1566, 1573 (N.D. Ill. 1996). The political parties' arguments on Rule 26's requirements are not well taken.

The declarations of the above-referenced witnesses include opinions that the outcomes of elections have been changed because the votes of "true believers" were diluted by the votes of non-party members, that the parties' political message is altered or adulterated by the blanket primary, that candidates elected under the blanket primary are "philosophically different," that the blanket primary increases the cost of primary election campaigns, and that the blanket primary "disillusions" party regulars and decreases their commitment to party activities. (See State's Response at 9 and citations to declarations therein) Much of the substance of these witnesses' testimony was addressed in the expert testimony of Professors Donovan and Olson, who are qualified to give such opinions, and the basis for their opinions is also known. The above-listed witnesses predicate their opinions on technical or other specialized knowledge that they have gained throughout the course of their service in the political parties' hierarchies or their careers as political consultants. The Court must carefully scrutinize testimony based on such experience:

> If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. *The trial courts' gate keep function requires more than taking the experts' word for it.*

KW Plastics v. United States Can Co., 131 F. Supp. 2d 1289, 1292 (M.D. Ala. 2001) (emphasis in original). The political parties' witnesses listed at the beginning of this section do not survive careful scrutiny. There is no data analyzed, no disclosure of methods employed, nor factual bases for their opinions disclosed. The Court declines to accept the above-referenced witnesses' testimony as opinion testimony from experts.

b. Lay Opinion Testimony – FRE 701

The political parties argue that the subject declarations from past and current party officials and their political consultants may be admitted as lay opinion testimony under Fed. R. Evid. 701, which provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The Advisory Committee Notes to the 2000 Amendments explain the import of this Rule:

> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process")

A review of the Declarations of the above-listed (Section 2 above) political party witnesses reveals that these witnesses are not simply testifying to ordinary matters within the realm of common experience, such as the appearance of persons or things, but these witnesses are giving their opinions, based on their purported experience and specialized knowledge, about the ultimate issues in the case: whether the blanket primary has caused harm to the political parties. Such testimony is improper lay opinion. *See Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 460 (5th Cir. 1996) (lay opinion testimony proper only if opinion and inferences do not require any specialized knowledge and could be reached by ordinary persons). The

danger here is that rather than the factual underpinnings consisting of empirical data, the witnesses' conclusions are supported by their experience (an amorphous matter in most cases), isolated anecdotal evidence, or belief. This kind of evidence going to critical aspects of this case does not make for proper opinion testimony – lay or expert – and it must be excluded. *See Hestor v. BIC Corp.*, 225 F.3d 178, 182 (2d Cir. 2000).

3. Insufficient Evidence of Burden

Even if one were to accept Mr. Snyder's report and the unobjectionable aspects of the political parties' lay witnesses' testimony, there is insufficient evidence to rebut the testimony of Professors Donovan and Olson. The Court would weigh the Snyder report against the professors' testimony and find that its infirmities rendered it worthless. Similarly, the Court would consider the political parties' other witnesses' testimony and find it to be insubstantial and wholly insufficient in the face of the professors' testimony.

There is before the Court, nevertheless, other evidence that is competent on the issue of whether there is a substantial burden to the political parties' association rights, and this evidence demonstrates that there is no such burden. Professor Olson stated that while there may be effects of the blanket primary, he did not agree with the political parties as to the magnitude, the frequency, the scope of the effects, or whether they constitute "burdens" on the parties. Professor Olson also thought that there may not actually be a burden on the political party, because it may benefit by having candidates selected who may actually be more likely to win the general election.

(Decl. of David J. Olson, p. 3, ¶ 7; and *see generally*, Olson Statement, competition for votes, pp. 5 & 6) Professor Olson stated that there is no legal or organizational basis for determining party membership; in the absence of party registration, state party membership is a matter of psychological identification. (Olson Dec. ¶ 11; Statement of David J. Olson, p. 4)

Professor Olson reviewed the harms and burdens that the opponents of the blanket primary have alleged and compared these with empirical studies by political scientists. (See discussion at pages 5-11 of Professor Olson's Statement.) He explained that political scientists view political parties as composed of three elements: (1) the party as organization, (2) the party in government, and (3) the party in the electorate. As to the party as organization, citing the findings of several studies of the subject, Professor Olson concluded that the alleged harms and burdens inflicted upon political parties in Washington are without foundation. (Olson Statement, pp. 5-13)

> The empirical findings on the strength of parties as organizations may be summarized: Washington political parties successfully sustain a wide range of activities, rank high nationally on measures of organizational strength, are among the most two-party competitive in the nation, are active in raising money for candidates and remain the single most important agency for recruiting and promoting candidates for public office.

(Olson Statement, p. 7)

As to the "Party in Government," while Paul Berendt (Chair of the Washington State Democratic Central Committee) opines that elected officials selected through a blanket primary "give low or no priority" to party goals

(Berendt Decl. p. 4, ll. 11-23), Professor Olson found this contention to be "absurd," because "Party is the single best predictor of how officials behave once in office." (Olson Decl. ¶ 15; Olson Statement, (citing a study) p. 8) Furthermore, Professor Olson discussed how the "Parties in Government" exercise power in a coordinated way. From a detailed discussion, he concludes:

> From the above, in Washington State it is the party in government that organizes the legislature and decides on leadership hierarchies, sets the agenda, enforces party cohesion, and creates the LCCs [legislative campaign committees] for fund raising and other campaign support activities.

(Olson Statement, p. 9)

In beginning his discussion of the "Party in the Electorate," Professor Olson cites the parties' criticisms of the blanket primary: the "pernicious effects" of cross-over voting with malicious intent and the filing of phony candidates. (Olson Statement, p. 9) He notes that there are broad, secular trends across the 50 states, such as the rise of candidate-centered campaigns, the consequences of which must be distinguished from effects attributable to the blanket primary, per se. He notes that party loyalties in the electorate across the United States and in Washington are weaker, and that there has been a rise in the use of legislative campaign committees (LCCs), PACs and independent expenditure groups as a partial replacement of political parties' roles. *Id.* Nevertheless, studies show that "The distribution of party loyalties in Washington generally resembles national patterns." *Id.* Professor Olson concludes further:

> It may then be said that the two parties hold issue positions at substantial variance with each other, they recruit candidates reflective of those issue positions, and once elected, partisan members of the legislative bodies significantly reflect the different positions represented by the parties and distributed through the electorate.

(Olson Statement, p. 10) Studies also conclude that cross-over voting with malicious intent simply does not occur. "There has been little evidence in the state of Washington of 'raiding' by regulars of the opposition party in order to secure the nomination of a candidate felt to be a weaker opponent." *Id.* Such a strategy, sophisticated though it is, is equally available in all direct primaries, whether of the closed, open, or blanket variety. (*See* Olson Statement, 10, 11) The parties speak often of their message of being diluted of competing for votes across the whole electorate in the blanket primary. There is, however, a larger interest at stake: "Voters who note the disjunction between message content in the primary versus general election raise questions about candidates' sincerity, and which positions they really advocate." (*Id.* at 11)

Absent a means of identifying voters' political party affiliation, there is no way to determine that cross-over voting has occurred. The Grange points out that the Supreme court cited the Ninth Circuit's definition of cross-over voting (See *California Democratic Party* 530 U.S. at 579 n. 9), and that when Professor Olson was asked whether in Washington there were cross-over voters defined as one voting in a party to which they are not registered, Professor Olson answered "No." (Olson Dep. p.107-8) This was the only possible answer, as there is no registration of voters by party in Washington.

Professor Donovan addressed the blanket primary's influence on public attitudes toward political parties. He stated: "Survey data suggest that voter attachments to parties, and partisan behavior in the electorate in Washington, are virtually identical to that observed in comparable states that use closed primaries." (Donovan Report p. 1) He continued: "A body of empirical work documents that public evaluations of political institutions are enhanced by electoral arrangements that allow voters more, rather than less, direct political participation." *Id.*

Professor Donovan also points out that while the political parties complain that they did not prefer some candidates who actually captured the party's nominations, "there is no data provided, however, that establishes that the party's self-identified voters did not prefer these candidates." (Donovan Supp. Decl. p. 11)

A concrete example given by Professor Donovan is Jennifer Dunn's campaign for Congress in 1992. The Republicans claim, through Mr. Meyers (former Executive Director of the Washington State Republican Party, and a consultant since 1993), that there was harm to the party in the way that she sought broad support in the primary. (Meyers Decl. p. 4) Professor Donovan pointed out that "No data or evidence is provided to establish that Dunn was not the nominee preferred by actual Republican voters in her 8th District. No evidence is provided that establishes that cross-over voting affected the outcome of this race." (Donovan Supp. Decl. p. 12)

Another example advanced by the Republican Party is the Louisiana primary where David Duke ran as a Republican and won. (See Vance Decl. p. 6) The Louisiana system was the one cited by Justice Scalia as a permissible

nonpartisan blanket primary where the top two (or however many a state prescribes) vote getters move on to the general election. (See Donovan Supp. Decl. p. 12) Professor Donovan notes that the Vance Declaration provided no evidence that Duke was not the preferred candidate of actual Republican voters, and noted additionally that analysis of surveys conducted in the 1991 Louisiana Gubernatorial runoff election found that Republicans were significantly more likely to vote for Duke than Democrats. *Id.*

The Democrats submit that the nomination of Democrat Dixy Lee Ray for the office of Governor in 1976 occurred only because Republicans, independents, and other non-Democrats cast votes for Ms. Ray in the 1976 primary. (Dem. Mot. At 11, with ref. to Olson and Butterworth Deps. and Butterworth Decl.) Apart from Butterworth's mere assertion, however, there is no evidence of this fact.

The political parties' evidence that there is a burden on their constitutional right of association is, for the most part, incompetent and inadmissible, and at best, it is insubstantial and speculative; the political parties have failed to carry their burden of proof.

IV. CONCLUSION

The political parties have not demonstrated that there is evidence of a substantial burden to their First Amendment right of association. Accordingly, the motions of the Democratic Party and the Republican Party must be denied.

The Defendants Secretary of State and the Grange have demonstrated that Washington's blanket primary is a

constitutional exercise of the State's power to regulate elections, as they have shown that the political parties have failed to come forth with sufficient evidence to prove the blanket primary's unconstitutionality. Summary judgment is proper if a defendant shows that there is no evidence supporting an element essential to a plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The State has shown that the political parties have failed to demonstrate the element of burden on their constitutional right of association. Accordingly, the State's motion for summary judgment must be granted.

NOW, THEREFORE,

IT IS ORDERED:

1. Motion of Defendant Sam S. Reed, as Secretary of State of Washington for Summary Judgment (Doc. #268) is GRANTED;

2. Motion of Plaintiff Washington State Democratic Party for Summary Judgment (Doc. #261) is DENIED;

3. Motion of Intervenor Republican State Committee of Washington for Summary Judgment (Doc. #273) is DENIED;

4. The following Motions of Defendant Reed to Strike are GRANTED;

    a. Strike Declarations Submitted on behalf of Washington State Democratic Party's Motion for Summary Judgment (Doc. #289)

    b. Strike Declarations Submitted on behalf of Republican Intervenors' Motion for Summary Judgment (Doc. #290) and

c. Strike Declaration of Michael Snyder and Expert Report and Attachments (Doc. #291)

5. This cause of action is DISMISSED, and the Clerk of the Court shall enter JUDGMENT in favor of Defendants.

DATED this 27 day of March, 2002.

/s/ _____
FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMOCRATIC PARTY OF WASHINGTON STATE, et al.,

Plaintiffs-Appellants,

WASHINGTON STATE GRANGE, et al.,

Intervenors-Appellees,

and,

REPUBLICAN STATE COMMITTEE OF WASHINGTON, JEFF KENT, et al.,

Intervenor,

v.

SAM REED, as Secretary of State of the State of Washington,

Defendant-Appellee.

No. 02-35422

D.C. No. CV-00-5419-FDB
Western District of Washington, Tacoma

ORDER

(Filed Oct. 23, 2003)

DEMOCRATIC PARTY OF WASHINGTON STATE, et al.,

Plaintiffs,

JEFF KENT, LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Intervenor, and,

REPUBLICAN STATE COMMITTEE OF WASHINGTON, JEFF KENT, et al.,

Intervenors-Appellants,

WASHINGTON STATE GRANGE, et al.,

Intervenors-Appellees,

v.

SAM REED, as Secretary of State of the State of Washington,

Defendant-Appellee.

No. 02-35422

D.C. No. CV-00-5419-FDB Western District of Washington, Tacoma

DEMOCRATIC PARTY OF WASHINGTON STATE, et al.,

Plaintiffs,

CHRISTOPHER VANCE, et al.,

Intervenors,

and,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Intervenors-Appellants,

WASHINGTON STATE GRANGE, et al.,

Intervenors-Appellees,

v.

SAM REED, as Secretary of State of the State of Washington,

Defendant-Appellee.

BEFORE: KLEINFELD and McKEOWN, Circuit Judges, and BREYER*, District Judge.

The panel has voted unanimously to deny defendant-appellee's petition for rehearing and intervenors-appellee's petition for rehearing. Judges Kleinfeld and McKeown have voted to deny defendant-appellee's petition for rehearing en banc and intervenors-appellees' petition for rehearing en banc, and Judge Breyer has recommended the same.

The full court has been advised of the petitions for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing and petitions for rehearing en banc are DENIED.

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* The Honorable Charles R. Breyer, District Judge for the Northern District of California, sitting by designation.

CERTIFICATION OF ENROLLMENT

HOUSE BILL 2297

Chapter 1, Laws of 2003

58th Legislature
2003 3rd Special Session

2004 PRESIDENTIAL PRIMARY

EFFECTIVE DATE: 12/9/2003 – Except section 2, which becomes effective 7/1/04.

Passed by the House
December 5, 2003
Yeas 84 Nays 7

FRANK CHOPP
Speaker of the House of Representatives

Passed by the Senate
December 5, 2003
Yeas 25 Nays 22

BRAD OWEN
President of the Senate

Approved December 9, 2003.

GARY LOCKE
Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 2297** as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER
Chief Clerk

FILED

December 9, 2003 – 3:40 p.m.

Secretary of State
State of Washington

HOUSE BILL 2297

Passed Legislature – 2003 3rd Special Session

State of Washington 58th Legislature
2003 3rd Special Session

By Representatives Haigh, Armstrong, Kagi, Nixon, Santos, Hinkle, Shabro, Tom, Fromhold, Delvin, Dickerson, Alexander, McCoy, Ahern, Simpson, Woods, Clibborn, McDonald, Kenney, Miloscia, Chase, Lantz, Bailey, Schual-Berke, Hudgins, Flannigan, Dunshee, Ruderman, Darneille, Upthegrove, Linville, Blake, Hunter, Quall, Hunt, Morris, Wallace, Kessler, Veloria, Hankins, Lovick, Eickmeyer, Berkey, Romero, Rockefeller, Morrell and Sullivan; by request of Governor Locke

Prefiled 12/3/2003. Read first time 12/05/2003. Referred to .

AN ACT Relating to the cancellation of the 2004 presidential primary; amending RCW 29.19.020 and 29A.56.020; providing an effective date; providing expiration dates; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 29.19.020 and 1995 1st sp.s. c 20 s 1 are each amended to read as follows:

(1) On the fourth Tuesday in May of each year in which a president of the United States is to be nominated and elected, a presidential primary shall be held at which voters may vote for the nominee of a major political party for the office of president. The secretary of state may

propose an alternative date for the primary no later than the first day of August of the year before the year in which a president is to be nominated and elected.

(2) No later than the first day of September of the year before the year in which a presidential nominee is selected, the state committee of any major political party that will use the primary results for candidates of that party may propose an alternative date for that primary.

(3) If an alternative date is proposed under subsection (1) or (2) of this section, a committee consisting of the chair and the vice-chair of the state committee of each major political party, the secretary of state, the majority leader and minority leader of the senate, and the speaker and the minority leader of the house of representatives shall meet and, if affirmed by a two-thirds vote of the members of the committee, the date of the primary shall be changed. The committee shall meet and decide on the proposed alternate date not later than the first day of October of the year before the year in which a presidential nominee is selected. The secretary of state shall convene and preside over the meeting of the committee. A committee member other than a legislator may appoint, in writing, a designee to serve on his or her behalf. A legislator who is a member of the committee may appoint, in writing, another legislator to serve on his or her behalf.

(4) If an alternate date is approved under this section, the secretary of state shall adopt rules under RCW 29.19.070 to adjust the deadlines in RCW 29.19.030 and related provisions of this chapter to correspond with the date that has been approved.

(5) no presidential primary may be held in 2004.

Sec. 2. RCW 29A.56.020 and 2003 c 111 s 1402 are each amended to read as follows:

(1) On the fourth Tuesday in May of each year in which a president of the United States is to be nominated and elected, a presidential primary shall be held at which voters may vote for the nominee of a major political party for the office of president. The secretary of state may propose an alternative date for the primary no later than the first day of August of the year before the year in which a president is to be nominated and elected.

(2) No later than the first day of September of the year before the year in which a presidential nominee is selected, the state committee of any major political party that will use the primary results for candidates of that party may propose an alternative date for that primary.

(3) If an alternative date is proposed under subsection (1) or (2) of this section, a committee consisting of the chair and the vice-chair of the state committee of each major political party, the secretary of state, the majority leader and minority leader of the senate, and the speaker and the minority leader of the house of representatives shall meet and, if affirmed by a two-thirds vote of the members of the committee, the date of the primary shall be changed. The committee shall meet and decide on the proposed alternate date not later than the first day of October of the year before the year in which a presidential nominee is selected. The secretary of state shall convene and preside over the meeting of the committee. A committee member other than a legislator may appoint, in writing, a designee to serve on his or her behalf. A legislator

who is a member of the committee may appoint, in writing, another legislator to serve on his or her behalf.

(4) If an alternate date is approved under this section, the secretary of state shall adopt rules under RCW 29A.04.620 to adjust the deadlines in RCW 29A.56.030 and related provisions of this chapter to correspond with the date that has been approved.

(5) No presidential primary may be held in 2004.

NEW SECTION. **Sec. 3.** Section 1 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

NEW SECTION. **Sec. 4.** Section 1 of this act expires July 1, 2004.

NEW SECTION. **Sec. 5.** Section 2 of this act takes effect July 1, 2004.

NEW SECTION. **Sec. 6.** Section 2 of this act expires January 1, 2005.

Passed by the House December 5, 2003.
Passed by the Senate December 5, 2003.
Approved by the Governor December 9, 2003.
Filed in Office of Secretary of State December 9, 2003.

WASHINGTON SUPREME COURT

[No. 26135. *En Banc*. July 9, 1936.]

E. ANDERSON, *Appellant*, v. EARL MILLIKIN, *as Auditor of King County, Respondents*.[1]

Appeal from a judgment of the superior court for King county, Findley, J., entered December 21, 1935, upon sustaining a demurrer to the complaint, dismissing an action for injunctive relief. Affirmed.

Lyle L. Iverson, Allen Spratlin, and *Thomas C. Kinney*, for appellant.

Warren G. Magnuson and *Edwin C. Ewing*, for respondent.

Griffiths & Chuck, E.W. Anderson, Yantis & Brodie, and *W. Le Roy LaFollette, amici curiae*.

TOLMAN, J. – The plaintiff, by his amended complaint, alleges that he is a qualified voter, a member of the Republican party, and desirous of advancing its principles, and, as such, he seeks to restrain the defendant, as county auditor, from proceeding officially in accordance with the terms of chapter 26, Laws of 1935, p. 60, upon the theory that the act mentioned is unconstitutional in a number of particulars, some of which will be referred to more specifically as we proceed.

A demurrer was interposed which, after argument, was sustained by the trial court. The plaintiff elected to stand on his amended complaint and a judgment of dismissal

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[1] Reported in 59 P. (2d) 295.

followed, from which he has appealed to this court. No formal assignments of error are made, but various arguments are advanced for the purpose of establishing that the measure known as the "Blanket Primary Act" denies rights which are guaranteed by both the Federal and the State Constitutions.

Chapter 26, Laws of 1935, p. 60, is entitled:

"ELECTIONS. BLANKET PRIMARY BALLOT.

"AN ACT relating to primary elections, providing for a Blanket Primary Ballot, amending sections 5185, 5187, 5189 and 5195 and Remington's Compiled Statutes of 1932, and repealing all laws in conflict therewith."

Section 1, p. 60, of the act provides that § 5185 of Remington's Compiled Statutes be amended and then proceeds to set forth the section as amended. Section 2, p. 60, in the same manner amends § 5187 of Remington's Compiled Statutes, and §§ 3 and 4, p. 63, in the same manner amend §§ 5189 and 5195 of Remington's Compiled Statutes. Section 5 p. 64, of the act reads:

"All laws or parts of laws in conflict or inconsistent with this act in any particular, or any part thereof, are hereby repealed, but it is expressly declared that the purposes of this act shall be construed so as to allow all properly registered voters to vote for their choice at any primary election, for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter." (Rem. 1935 Sup., § 5195-1 [P. C. § 2229a].)

It is not necessary for present purposes to set forth in detail the previous legislation upon the same subject which is thus amended. The objects and purposes to be

obtained are sufficiently revealed by § 5, p. 64, of the 1935 act, which we have quoted, and in giving effect to § 5 and thus carrying out the purposes of the Legislature we are required, by our recognized rules of construction, to regard as repealed by necessary implication anything and everything contained in the prior acts of the Legislature which would defeat the avowed purpose of permitting all properly registered voters to vote for their individual choice as to each office at primary election, regardless of political affiliation and without a declaration of political faith. This declaration of policy clearly indicates the purpose of affording secrecy to the individual voter as to his party affiliations as well as to his choice of individual candidates. That purpose, being a salutary one which accords with the spirit of our Constitution, must be sustained unless, very clearly, constitutional rights are denied.

The sections amended are a part of our direct primary law and that law still stands except as amended or repealed by the 1935 act. This court, in its previous decisions sustaining the direct primary law, has met and answered most of the objections which are now presented.

State ex rel. Zent v. Nichols, 50 Wash. 508, 97 Pac. 728, exhaustively treats of and refutes a number of the arguments here advanced and that case may well be read in connection with what is here said. We cannot review the various arguments there advanced or quote from its well-considered language at length, but must be content with the following brief quotations which go to the very gist of the arguments now advanced:

"The last general objection to be noticed is that the law tends to destroy political parties. Counsel confess that they can find no specific provision of the Constitution on

which to base the contention, but they assert the general utility and necessity of parties, and argue therefrom that legislation tending to destroy them must receive the condemnation of the courts. It has seemed to us, however, that this is a political, rather than a judicial, question, and that an appeal from the legislative decision must be made to the people rather than to the courts. . . .

"So long as voting is by ballot, an official ballot is a convenience, if not a necessity, and some authority vested somewhere in government must determine the names which shall appear on that ballot, and those names must necessarily be few in number; and, we repeat, any reasonable method prescribed by the lawmaking power which accomplishes this result must be sustained by the judicial department of government. The courts have no concern with its wisdom or policy."

In *State ex rel. Shepard v. Superior Court*, 60 Wash. 370, 111 Pac. 233, 140 Am. St. 925, this court said:

"Recurring again to fundamental principles, the whole argument in this behalf is met by the undisputed proposition that the Constitution takes no concern of political parties. The people in adopting the Constitutions, both state and Federal, wisely considered that political parties are evanescent things, born of political emotions and of uncertain – sometimes precarious – tenure of life, and went no further than to protect the elector in his right to cast a ballot; not a coerced party ballot, but for the candidate of his choice, whether he be upon one ballot or another. . . .

"Political parties being neither mentioned, protected, nor favored in the Constitution, a law will not be held to be unconstitutional, although in its workings it may

destroy these organizations. If a party is to be protected at all hazards, the Australian ballot, the primary law, and the commission plan of government must all fall upon the first attack, for the working, if indeed it is not the design, is to break down parties and put the burden entirely upon the elector. . . .

"Finding no guaranty, express or implied, in favor of either a candidate or a party in the Constitution, it follows that he or his party can claim no greater rights than the voter himself. The fountain cannot rise higher than its source."

See, also, *State ex rel. Rogers v. Howell*, 92 Wash. 381, 159 Pac. 118, and from other states: *Koelsch v. Girard*, 54 Ida., 452, 33 P. (2d) 816; *Dupre v. St. Jacques*, 51 R.I. 189, 153 Atl. 240; *Sqrlls v. State*, 201 Ind. 88, 166 N. E. 270, 67 A. L. R. 718; *State ex rel. Weinberger Duniway v. Portland*, 65 Ore. 273, 133 Pac. 62; *State ex rel. v. Miller*, 87 Ohio St. 12, 99 N. E. 1078, Ann. Cas. 1913 E, 761, 44 L. R. A. (N. S.) 712; *Winston v. Moore*, 244 Pa. 447, 91 Atl. 520, Ann. Cas. 1915C, 498, L. R. A. 1915A, 1190; and *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961.

Without detailing each argument presented or attempting to answer it specifically, it may be safely said that these authorities fully meet and amply refute every attack which is here made upon the act of 1935, save possibly one which, because of its novelty, perhaps requires more specific treatment.

Rem. Rev. Stat., § 5198 [p. C. § 2243], provides for the election of precinct committeemen for each party participating in the September primaries and that "The one having the highest number of votes shall be such committeeman of such party for such precinct."

This section was not amended by the act of 1935, but if anything in it necessarily conflicts with the purpose of the amending act, such conflicting part would be inconsistent with the amending act and would necessarily be repealed by the repealing provision already quoted. We are not now convinced that there is a necessary conflict, hence, we pass the question of repeal of the provision for the election of party precinct committeemen.

It is not argued that without the party test, which was abolished by the act of 1935, those voters so disposed may elect Democrats as Republican precinct committeemen and *vice versa*, with a result that the voters of one party may capture the governing body of an opposing party and thus obtain and take from it its funds and property and likewise thus prevent its support and advocacy of those political principles for the furtherance of which it exists.

Of course, under the provisions of Rem. Rev. Stat., § 5170 [P. C. § 2161], no person may lawfully join in the nomination of more than one precinct committeeman and it is not to be presumed that any voter will abandon his right to participate in the selection of the committeeman of his own party in order to foist an unwanted individual upon a party to which he is opposed. But, whether so or not, the provisions now under consideration apply equally to all parties who may be affected thereby and thus there is no discrimination in favor of or against any. If, as we have already said, "political parties are neither mentioned, protected, or favored in the Constitution" (*State ex rel. Shepard v. Superior Court*, *supra*), then if all are treated alike, none has any just cause of complaint.

Moreover, the statute, as we read it, makes no attempt to control the inherent power of a political party to

adopt principles and to require its members, and especially its officials, to give adherence thereto; nor does the statute deny the inherent right of a political party to expel any official whose actions and beliefs are antagonistic to its announced principles. In this inherent right of a political party to expel or refuse to seat any committeeman who does not subscribe to the party principles, we see a complete defense against the feared assault upon party integrity. This question is controlled by the authorities already cited and therefore the act of 1935 does not violate either the Federal or the state Constitution.

The judgment is affirmed.

MILLARD, C. J., and MAIN, GERAGHTY, HOLCOMB, BLAKE, and BEALS, JJ., concur.

MITCHELL, J., concurs in the result.

STEINERT, Justice (concurring) – I concur with the majority in all that is stated in the opinion, except the next to last paragraph thereof which refers to the inherent right of a political party to expel or refuse to seat any committeeman who does not subscribe to the party principles. Conceding such right, generally, I fail to see how it is possible to enforce such right under the existing law pertaining to elections.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA LIBERTARIAN PARTY, INC.; BARRY HESS; PETER SCHMERL; JOHN JASON AUVENSHINE; ED KAIN,

Plaintiffs-Appellees,

v.

BETSEY BAYLESS, Arizona Secretary of State,

Defendant-Appellant,

and

BOARD OF SUPERVISORS OF PIMA COUNTY, ARIZONA,

Defendant.

No. 02-16535

D.C. No. CV-02-00144-RCC

OPINION

Appeal from the United States District Court for the District of Arizona Rancr C. Collins, District Judge, Presiding

Argued and Submitted June 9, 2003 – San Francisco, California

Filed December 8, 2003

Before: Mary M. Schroeder, Chief Judge, Dorothy W. Nelson, and William A. Fletcher, Circuit Judges.

Per Curiam Opinion

COUNSEL

Paula Bickett and Joseph A. Kanefield, Assistant Attorneys General of the State of Arizona, Phoenix, Arizona, for the defendant-appellant.

David T. Hardy, Tucson, Arizona, for the plaintiffs-appellees.

Daniel R. Ortiz University of Virginia Law School, Charlottesville, Virginia, for amicus curiae The Reform Institute Inc.

OPINION

PER CURIAM.

Arizona Libertarian Party, Inc., and four of its members, challenge Arizona's semiclosed primary system, added to the state constitution by Arizona voters in 1998. Under Arizona's primary system, voters who are unaffiliated, registered as independents, or registered as members of parties that are not on the primary ballot may vote in the party primary of their choice. *See* Ariz. Const. art. VII, § 10; Ariz. Rev. Stat. §§ 16-467, 16-542. Voters who are registered with a party that is on the ballot may vote only in their party's primary. *See* Ariz. Rev. Stat. § 16-467. The primary ballot contains the names of candidates for all government officers elected in the general election, as well as party precinct committeemen, who are elected in the primary.

The district court held that the primary system violates the plaintiffs' First Amendment right to select their party leaders free from governmental interference because the law allows nonparty members to vote for party precinct committeemen. *See Arizona Libertarian Party,*

Inc. v. Bd. of Supervisors of Pima County, 216 F. Supp. 2d 1007, 1010 (D. Ariz. 2002). The court summarily held that the entire primary system was unconstitutional without separately considering whether nonmembers' selection of party nominees in the primary election violates the First Amendment. *Id.* We affirm as to the election of Libertarian Party precinct committeemen. We remand so that the district court may consider separately whether nonmembers' participation in the selection of Libertarian candidates is unconstitutional and, if not, whether the provisions related to the election of Libertarian precinct committeemen are severable.

I. STANDING

We first address the defendant's argument that the plaintiffs lack standing to bring a claim against the defendant, the Arizona Secretary of State, challenging Arizona's primary system. To have a justiciable claim, the plaintiffs must meet three requirements: (1) they must have suffered an injury-in-fact; (2) the injury must be traceable to the defendant's conduct; and (3) a favorable court decision must be likely to redress the injury. *See Rubin v. City of Santa Monica,* 308 F.3d 1008, 1019 (9th Cir. 2002) (citing *Northeastern Fla. Contractors v. Jacksonville,* 508 U.S. 656, 663 (1993)). The plaintiffs have met these three requirements.

We agree with the other circuits to consider standing in the election context that the harm to the Libertarian Party's right to determine for itself with whom it will associate politically is a sufficient injury to confer standing. *See Lerman v. Bd. of Elections in New York,* 232 F.3d 135, 143 (2d Cir. 2000); *Krislov v. Rednour,* 226 F.3d 851,

858 (7th Cir. 2000). It is not necessary for the plaintiffs to show that the primary system affected the outcome of any contested races.

The plaintiffs' injury is also traceable to the defendant's conduct, and may be redressed by a favorable court decision, because the Secretary of State has authority over primary elections. The Secretary of State in Arizona is responsible for promulgating rules and procedures for the administration of primary elections, including rules related to the distribution of ballots. *See* Ariz. Rev. Stat. § 16-452(A). Any person who does not abide by the Secretary of State's rules is subject to criminal penalties. *See* Ariz. Rev. Stat. § 16-452(C). The defendant relies on *Rubin* to argue that any injury the plaintiffs have suffered is traceable to the counties, which directly administer primary elections, and not the Secretary of State. *See Rubin,* 308 F.3d at 1019-20. Unlike the electoral scheme in *Rubin,* however, the Arizona Secretary of State's promulgated rules are applicable to and mandatory for the statewide primary elections at issue here. We therefore conclude that the plaintiffs have standing in this case.

II. SELECTION OF PRECINCT COMMITTEEMEN

Our decision on the merits is guided by two Supreme Court decisions involving California election laws. The first relates to the selection of party leaders. *See Eu v. San Francisco County Democratic Cent. Comm.,* 489 U.S. 214 (1989). The other relates to the selection of party candidates. *See California Democratic Party v. Jones,* 530 U.S. 567 (2000); *see also Democratic Party of Washington State v. Reed,* 343 F.3d 1198 (9th Cir. 2003). We apply a balancing test to determine whether an election law violates a

political party's associational rights. *See Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358 (1997). A state law that imposes a severe burden on those rights must be narrowly tailored and advance a compelling state interest. *Id.* A law that imposes a lesser burden is subject to a less exacting review, and "important regulatory interests" are sufficient to justify it. *Id.*

The district court correctly held that allowing nonmembers to vote for party precinct committeemen violates the Libertarian Party's associational rights. Precinct committeemen are important party leaders who choose replacement candidates for candidates who die or resign before an election, Ariz. Rev. Stat. § 16-343, and collectively constitute the state party committee, Ariz. Rev. Stat. §§ 16-821, 16-825. In *Eu*, the Supreme Court held that California's restrictions on how parties should be organized and how they select their leaders unconstitutionally burdened political parties' freedom of association. 489 U.S. at 230-31 ("Here, party members do not seek to associate with nonparty members, but only with one another in freely choosing their party leaders."). The Court recognized the strength of a party's interest in selecting its own leaders. *See id.* at 230. It also noted the important role party leaders play in shaping the party's message. *See id.* at 231 n.21.

The Secretary of State has not articulated any state interest to justify allowing nonmembers to vote for Libertarian Party precinct committeemen, and we see none. In the absence of a state interest to justify the burden on the plaintiffs' freedom of association, we agree with the district court that allowing nonmembers to vote for precinct committeemen violates the party's associational rights. *See Cool Moose Party v. Rhode Island,* 183 F.3d 80, 88 (1st Cir.

1999) (declaring prohibitions on opening primaries to nonmembers unconstitutional where the state failed to articulate any justification).

Thus, insofar as the district court concluded that the semiclosed primary violated the associational rights of the Libertarians because it allowed nonmembers to vote for precinct committeemen, we agree. The district court, however, went beyond that conclusion in determining that the associational rights of the Republicans and the Democrats, the only other parties with ongoing ballot access, are violated for the same reason. The district court's order should have been limited to the Arizona Libertarian Party because the Democrats and Republicans are not parties to this suit, and because the record with respect to the impact on their associational rights has not been developed. The outcome may well differ for parties that embrace the idea of a semiclosed primary. *See United States v. Nat'l Treasury Employees Union,* 513 U.S. 454, 477-78 (1995).

III. SELECTION OF CANDIDATES

The district court also erred in failing to consider separately whether the participation of nonmembers in the selection of candidates is constitutional under *California Democratic Party v. Jones. See* 530 U.S. 567. Although forcing the Libertarians to open their primary to nonmembers for the selection of party candidates raises serious constitutional concerns, we conclude that the resolution of the constitutional issue turns on factual questions not decided by the district court. We therefore remand so that the district court may consider the severity of the burden this aspect of the primary system imposes on the Libertarian

Party's associational rights, whether the state has sufficiently justified that burden, and if so, whether the selection of precinct committeemen is severable from the remainder of this semiclosed primary system.

These factual issues must be reviewed in light of the Court's opinion in *Jones*. The Supreme Court there held that California's blanket primary system imposed a severe burden on a party's right to decide for itself who it will, and will not, associate with for the purposes of selecting a candidate. *Jones,* 530 U.S. at 582; *see also Reed,* 343 F.3d at 1204-05. Under a blanket primary system, all voters are able to vote for any candidate, regardless of party affiliation. *Jones,* 530 U.S. at 570. This system differs from Arizona's, which restricts registered members of opposing parties with ballot access to voting in their own party's primary. Arizona's system also limits independent and unaffiliated voters who choose to vote in a party primary to participating in selecting only the candidates of that party. The Supreme Court in *Jones* noted that a system "in which the voter is limited to one party's ballot" may be "constitutionally distinct" from the unconstitutional blanket primary. *Id.* at 577 n.8.

In striking down California's blanket primary, however, the Supreme Court focused on the potential for the participation of nonparty members, including registered members of other parties, to influence the choice of the nominee at the primary and to cause partisan candidates to change their message to appeal to a more centrist voter base. *See Id.* at 578-79. Because of their smaller size, minor parties such as the plaintiff here are at a greater risk of both of these outcomes when their primaries are opened to nonmembers. *See id.* at 578. We observe that the Court in *Jones* treated the risk that nonparty members

will skew either primary results or candidates' positions as a factual issue, with the plaintiffs having the burden of establishing that risk. *See id.* On remand, the district court should separately consider the constitutionality of nonparty members voting for Libertarian party candidates for public office, including the primary system's potential to change the party's nominee or the candidates' positions.

Should the district court determine that Arizona's candidate selection system is constitutional under *Jones,* it next must conduct a severability analysis. In general, only the unconstitutional portion of a legislative enactment should be invalidated. *See Nat'l Adver. Co. v. City of Orange,* 861 F.2d 246, 249-50 (9th Cir. 1988). Although severability is a question of state law that we review de novo, *see Randolph v. Groscost,* 989 P.2d 751, 755 (1999) (setting out the test for considering the severability of provisions of voter-approved initiative under Arizona law); *Salve Regina College v. Russell,* 499 U.S. 225, 239 (1991) (holding that the district court's interpretation of state law is reviewed de novo), we nonetheless consider it prudent to remand to the district court where "we believe the district court is better able to decide the question in the first instance." *Presbyterian Church (U.S.A.) v. United States,* 870 F.2d 518, 529 (9th Cir. 1989).

CONCLUSION

We AFFIRM the district court's grant of summary judgment as it pertains to the election of Libertarian party precinct committeemen. We VACATE the district court's grant of summary judgment to the extent that it applies to parties other than the Libertarian Party, and as it pertains to the selection of Libertarian Party candidates. We

REMAND so that the district court may consider separately the constitutionality of requiring the Libertarian Party to allow nonmembers to select party candidates and if necessary the severability of the provision relating to the election of Libertarian Party precinct committeemen. Our holding is limited to the Arizona primary system as applied to the Libertarian Party, and does not apply to any other political parties.

AFFIRMED IN PART, VACATED IN PART, and REMANDED.

WASHINGTON SUPREME COURT

[No. 45503. En Banc. June 5, 1980.]

EDWARD HEAVEY, ET AL, *Appellants*, v. BRUCE K. CHAPMAN, ET AL, *Respondents*.

Nature of Action: A political party and two of its members challenged the validity of the blanket primary system whereby any registered voter could vote for any candidate in a primary election.

Superior Court: The Superior Court for Thurston County, No. 59171, Hewitt A. Henry, J., on March 30, 1978, granted a summary judgment in favor of the defendants.

Supreme Court: Finding that the plaintiffs had not produced any evidence that the blanket primary system unconstitutionally restricted the right of freedom of association, the court *affirms* the judgment.

Bernard J. Heavey, Jr., and *Joseph T. Moynihan*, for appellants.

Slade Gorton, Attorney General, and *Carol A. Smith, Assistant*, for respondents.

Robert H. Aronson on behalf of the University of Washington School of Law and *Wallace M. Rudolph* on behalf of the University of Puget Sound School of Law, amici curiae.

DOLLIVER, J. – This is the second case to come before us which raises constitutional objections to provisions of the state election laws as they are alleged to conflict with the "Charter of the Democratic Party of Washington" adopted by the Washington State Democratic Convention in Olympia on June 12, 1976. The first case, *Marchioro v.*

Chaney, 90 Wn.2d 298, 582 P.2d 487 (1978), held the equal sex representation requirements for major political party state committees to be valid. Our decision was subsequently upheld unanimously by the United States Supreme Court. *Marchioro v. Chaney*, 442 U.S. 191, 60 L. Ed. 2d 816, 99 S. Ct. 2243 (1979).

This case raises the question of whether the blanket primary (RCW 29.18.200) and those statutes implementing it (RCW 29.30.010, .030) unconstitutionally restrict the plaintiffs' right of association under the state and federal constitutions. We hold they do not and affirm the trial court.

The blanket primary was adopted by the legislature in Laws of 1935, ch. 26, p. 60, and immediately subjected to challenge on constitutional grounds. In *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936), the court rejected all claims of constitutional infirmity and upheld the statutes. The plaintiffs correctly point out that *Anderson* was decided prior to the recognition by this court in *Marchioro* and by the United States Supreme Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163, (1958), of a constitutional right of freedom of association. Therefore, while *Anderson* retains its vitality as to those constitutional issues which it discussed, in view of the subsequent articulation of a constitutional right to freedom of association, that issue must be considered in this case. *See generally The Constitutionality of Non-Member Voting in Political Party Primary Elections*, 14 Willamette L.J. 259 (1978).

In *Marchioro*, we said, at page 309:

> In *Storer v. Brown*, 415 U.S. 724, 729, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974), the court

> stated, "substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest." While the defendants have the burden to show a compelling state interest, proof of a substantial burden on the right to associate for political purposes is a prerequisite to finding a violation of plaintiffs' associational rights. This burden of proof is on the plaintiffs. *American Party v. White*, 415 U.S. 767, 790, 39 L. Ed. 2d 744, 94 S. Ct. 1296 (1974); *Fahey v. Darigan*, [405 F. Supp. 1386 (D.R.I. 1975)]. Thus, we must first inquire as to whether plaintiffs have shown a substantial burden on their association for political purposes.

See Marchioro v. Chaney, 442 U.S. 191, 60 L. Ed. 2d 816, 99 S. Ct. 2243 (1979).

Have plaintiffs shown a substantial burden? Not only have they not shown a substantial burden, but they concede they cannot do so. Plaintiffs seek to avoid establishing a substantial burden by asserting the court places a "burden of negative proof" on them to which they cannot respond because voter ballots are made secret by another separate state action, the secret ballot. Plaintiffs suggest we abandon the substantial burden test and instead adopt what they term the "modified review standard". *See* Note, *Primary Elections: The Real Party in Interest*, 27 Rutgers L.Rev. 298 (1974). The modified review standard has not been adopted by the United States Supreme Court or by this court, and we decline the invitation to embrace it in this case. Although, as plaintiffs complain, it may be difficult or even impossible to assume the burden of proof in this case, at the very least those who would overturn

statutes on constitutional grounds should offer some evidence they have been harmed. Mere assertions of injury do not make for the violation of constitutional rights.

We believe the failure of plaintiffs even to attempt to show a substantial burden to their right of association is dispositive of the case. Nonetheless, consideration should be given to two recent cases cited by plaintiffs which deal with primary elections: *Rosario v. Rockefeller*, 410 U.S. 752, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973), and *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn. 1976), *aff'd*, 429 U.S. 989, 50 L. Ed. 2d 602, 97 S. Ct. 516 (1976). Both of these cases concerned the exclusion by statute of voters from participating in party primaries. In neither case was the situation similar to this where the statutes in issue do not restrict but rather open the primary for full participation by all citizens. As pointed out in *Nader*, there are a number of actions a state legislature may take to preserve " 'the integrity of the electoral process' ". *Nader*, at 846. *See Rosario v. Rockefeller, supra*. But there is no constitutional requirement that these actions be taken; rather it is not unconstitutional if they are taken.

Both *Rosario* and *Nader* challenged a primary system which *restricted* participation in primary elections and not, as here, a system which encourages and facilitates participation. This distinction was commented on in *Nader* where the court said, at pages 849-50:

> The comparative merits of various forms of primary election systems have been widely debated in this presidential election year. In particular, the "open" and "crossover" primaries, which permit independents and/or members of other parties to participate in a given party's primary, have been the subject of controversy.

> A state may legislate to prevent the perceived evils of crossover voting, *e.g., Rosario v. Rockefeller*, [410 U.S. 752, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973)], but several states permit crossover voting in their primaries. Others have provision for primaries which allow participation by independents and members of other parties. There is no suggestion that such a clause makes the election laws unconstitutional, nor is it a mandatory prerequisite to constitutionality that independent, non-member electors be permitted to vote in a party's primary. The Connecticut General Assembly has adopted statutes governing political party primaries which it considers best meet the needs of the State. The laws are not invidiously discriminatory but apply to all alike. The legislatures of "(t)he states have broad discretion in formulating election policies."

(Footnotes and citations omitted.)

Nader and *Rosario* hold that a state *may*, if it chooses, institute a closed primary system. *But see Kusper v. Pontikes*, 414 U.S. 51, 38 L. Ed. 2d 260, 94 S. Ct. 303 (1973). *Nader* and *Rosario* neither establish any mandatory duty that a state *must* have closed primaries nor do they forbid a blanket primary.

Plaintiffs argue the Democratic Party is a private party and a voluntary association. The last time this assertion was seriously advanced was in *Smith v. Allwright*, 321 U.S. 649, 88 L. Ed. 987, 64 S. Ct. 757 (1944). In *Smith*, the Supreme Court struck down the "white primary" and in doing so rejected arguments strikingly similar to those advanced by plaintiffs.

In *Marchioro v. Chaney*, 90 Wn.2d 298, 309, 582 P.2d 487 (1978), we said:

> No case of the United States Supreme Court has extended the right of association in political affairs to areas outside of racial discrimination or participation in the electoral process. Furthermore, there seems to be little inclination to expand the doctrine to other aspects of the political process. As *Storer v. Brown*, [415 U.S. 724, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974)], at 730 states, "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases".

It is not alleged the blanket primary is either racially discriminatory or impedes participation in the electoral process.

Finally, even though plaintiffs' case fails since they have shown no substantial burden to their associational rights, it is important to indicate certain compelling state interests which support a blanket primary. Among these are: allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary. As stated in RCW 29.18.200, the purpose of the statute is to allow

> All properly registered voters [to] vote for their choice at any primary election, for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter.

Moreover, the state interest in allowing voters to support the candidates of their choice in a primary can be achieved only by the blanket primary which allows complete voter freedom in alternating votes between parties, since an open primary, on the other hand, restricts a voter

to candidates of only one party. The blanket primary is the least drastic means available to promote this legitimate state interest.

It may be the blanket primary has defects and should be corrected, amended, or even repealed. The appropriate forum for this enterprise is either by action of the legislature or by popular initiative, not this court. *See State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 P. 728 (1908).

Affirmed.

ROSELLINI, STAFFORD, WRIGHT, BRACHTENBACH, HICKS and WILLIAMS, JJ., concur.

HOROWITZ, J. (specially concurring). – I agree that the rationale of *Marchioro v. Chaney*, 442 U.S. 191, 60 L. Ed. 2d 816, 99 S. Ct. 2243 (1979), requires us to reject appellants' challenge to the constitutionality of the State's blanket primary law, Laws of 1935, ch. 26, p. 60. Appellants have not, and, indeed, cannot prove a substantial violation of their constitutional rights of association as a result of the existence or operation of this State's blanket primary. Some crossover voting occurs, but we are unable to take judicial notice of its extent so as to determine whether prejudice has resulted. Experience in other states suggests that any crossover voting is minimal and of little effect, as noted by the Wisconsin Supreme Court in *State ex rel. La Follette v. Democratic Party*, 93 Wis. 2d 473, 287 N.W.2d 519, 533-34 (1980). The court rejected a challenge to Wisconsin's open presidential preference primary for the same reason we must reject appellants' challenge. In the absence of a showing of prejudice by the enactment of the State's blanket primary law, we are required to assume that the primary law rests on an appropriate factual basis both with respect to the evils to be remedied and to the

benefits to be conferred by the enactment of the statute. Accordingly, I concur in the result reached by the majority.

UTTER, C. J., concurs with Horowitz, J.